Supreme Court, U.S.
FILED

04 410 SEP 23 2004

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No. _____

In The

Supreme Court of the United States

DANIEL BERTRAND,

Petitioner,

v.

THEODORE W. OSWALD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PEGGY A. LAUTENSCHLAGER
Attorney General
WARREN D. WEINSTEIN*
Assistant Attorney General
Attorneys for Petitioner
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9444
* Counsel of Record

QUESTIONS PRESENTED

In determining under AEDPA whether a state court decision is an unreasonable application of United States Supreme Court precedent (28 U.S.C. § 2254 (d)(1)), may a federal court "distill" the "clearly established federal law" from decisions of the courts of appeal when that distillation requires extension of this Court's precedent to a materially different fact situation?

Whether, under AEDPA, a federal court gives the deference required by 28 U.S.C. § 2254(d)(1) when the federal law "clearly established" by this Court's precedent is a general standard requiring the state court to exercise a substantial element of judgment with which the federal court disagrees.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (App., *infra*, 1a-22a) is reported at 374 F.3d 475. The opinion of the United States District Court for the Eastern District of Wisconsin (App., *infra*, 23a-84a) is reported at 249 F. Supp. 2d 1078. The Wisconsin Court of Appeals' decision (App., *infra*, 85a-121a) is reported at 2000 WI App 2, 606 N.W.2d 207.

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit was filed on June 29, 2004. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1). The decision of the Court of Appeals affirmed a final judgment of the United States District Court for the Eastern District of Wisconsin granting habeas corpus relief to a state prisoner pursuant to 28 U.S.C § 2254(a).

STATEMENT OF THE CASE

A. Summary.

Theodore Oswald, along with his father James, robbed a bank in Wales, Wisconsin, on the morning of April 28, 1994. They fled and traveled toward Waukesha, Wisconsin. Two Waukesha police officers stopped the Oswald vehicle, at which point the Oswalds, armed with semi-automatic rifles, got out of the vehicle and shot at the officers, killing one. A chase ensued, during which the Oswalds forced their way into a private residence, took a woman who was inside hostage and forced her to drive them away in her vehicle. The chase ended in a shootout between the Oswalds and numerous police officers, in which two officers and the hostage sustained gunshot wounds. By the time of the shootout, local media had gotten wind of the incident and the shootout was filmed live and rebroadcast extensively. App., *infra*, 24a-25a.

Oswald was tried separately from his father nine and a half months after their crime spree. His defense at trial was coercion; he claimed his father brainwashed him into participating in the crimes. App., *infra*, 4a. The Seventh Circuit referred to Oswald's defense as a Manchurian Candidate defense. App., *infra*, 10a. A jury found Oswald

guilty of nineteen separate crimes after a three-week jury trial. He moved the Waukesha County Circuit Court for a new trial arguing that a new trial was warranted because of juror bias, the circuit court did not conduct an adequate investigation of prospective juror misconduct and his trial counsel was ineffective in various respects. App., *infra*, 85a. The Waukesha County Circuit Court denied the motion, the Wisconsin Court of Appeals affirmed, App., *infra*, 86a-87a, 120a, and the Wisconsin Supreme Court declined review, App., *infra*, 1a.

Oswald then sought habeas corpus relief pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Wisconsin. The district court granted habeas relief. App., *infra*, 23a-84a. Warden Bertrand appealed the district court's decision. The United States Court of Appeals for the Seventh Circuit affirmed. App., *infra*, 1a-22a.

Petitioner seeks this Court's review of the Seventh Circuit's decision holding that the Wisconsin Court of Appeals' decision was an unreasonable application of *Remmer v. United States*, 347 U.S. 227, 230 (1954), and *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

B. Material facts and rulings below.

Oswald decided for tactical reasons not to request a change of venue from Waukesha County. He attempted to turn to his advantage the publicity surrounding the crimes, which had consistently portrayed him as an impressionable teenager who was victimized by his abusive and manipulating father. App., *infra*, 4a. A few weeks before trial, the circuit court heard arguments regarding jury selection. The court determined that three alternate jurors would be impaneled. Because alternate jurors would be seated, each party was

granted an additional peremptory strike, or seven total strikes. *See* Wis. Stat. § 972.03. App., *infra*, 4a-5a. This resulted in a twenty-nine person jury pool (the sum of fifteen jurors plus fourteen peremptory strikes) from which the jury would be selected. App., *infra*, 5a. Oswald's motions to use juror questionnaires and to conduct individual *voir dire* of the jurors were both granted. *Voir dire* took place over four days. During the course of *voir dire*, Oswald moved the court to strike twenty-seven jurors for cause. The court granted all but six of Oswald's requests to strike. App., *infra*, 86a-87a.

On the fourth day of jury selection, allegations of possible misconduct in the room where the venire awaited individual *voir dire* arose during the *voir dire* of prospective juror Roger Klitzka. When the court asked him about media exposure, Klitzka replied: "I know I've learned more in the last three days here sitting down there in that [waiting] room about this case than I have since the day that it happened[.]" App., *infra*, 27a. After Klitzka's admission, Oswald requested that the court strike him for cause and conduct an investigation into the content of prospective jurors' conversations in the waiting room. The circuit court denied the challenge for cause. App., *infra*, 101a-102a. The circuit court denied the request to recall any previously questioned prospective jurors, but did permit the defense to question the remaining prospective jurors about waiting room conversations. The defense questioned the remaining prospective jurors and the bailiff who supervised the waiting room about conversations in the waiting room. App., *infra*, 102a.

Two of the prospective jurors who were questioned admitted that conversations about Oswald's guilt took place in the waiting room. Oswald again requested that the court conduct an inquiry of the prospective jurors who had previously been qualified to serve on the panel and determine

if they had participated in or been affected by any discussions. The circuit court denied the request. *Id.*

At the postconviction hearing, Oswald presented the additional evidence of juror misconduct—the testimony of prospective juror Jacqueline M. who had been stricken from the jury panel. Jacqueline M. testified that, while in the waiting room, she heard at least three prospective jurors express opinions that Oswald was guilty and that the trial was a joke and a waste of time. She stated that one of these jurors, William Schuenke, was seated on the jury panel that decided the case. App., *infra*, 102a. In its oral decision denying Oswald's postconviction motion for a new trial, the circuit court stated that it did not find Jacqueline M. to be credible. It concluded that Oswald failed to make a sufficient showing that misconduct occurred. App., *infra*, 103a.

On appeal as relevant here, Oswald claimed the trial court's failure to allow him to question members of the venire who had already been qualified prevented him from establishing that Schuenke gave false answers during *voir dire* and that Schuenke was actually biased. App., *infra*, 103a-104a. The Wisconsin Court of Appeals determined that the circuit court did not misuse its discretion in conducting its *voir dire* examination. App., *infra*, 104a-105a.

The district court granted habeas corpus relief on three grounds; the Seventh Circuit addressed only one of these grounds. The court held that the Wisconsin Court of Appeals unreasonably applied *Remmer* and *Smith* when it did not find error in the circuit court's refusal to question the prospective jurors who had previously been qualified to serve on the panel to determine if they had participated in or been affected by any discussions.

REASONS FOR GRANTING THE PETITION

I. CERTIORARI IS NECESSARY BECAUSE THE SEVENTH CIRCUIT COURT OF APPEALS RELIED ON THIS COURT'S DICTA AND COURT OF APPEALS' INTERPRETATIONS OF THIS COURT'S PRECEDENTS.

A federal court is authorized to grant a state prisoner habeas corpus relief where a state court decision on the merits of a petitioner's claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States ...." 28 U.S.C. § 2254(d)(1). "For purposes of 28 U.S.C. § 2254(d)(1), clearly established law as determined by this Court 'refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision.'" *Yarborough v. Alvarado*, 124 S. Ct. 2140, 2147 (2004), quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000). It also follows from this quotation that the interpretation of how this court's holdings are applied to materially different fact situations by the various courts of appeals, do not constitute "clearly established Federal law" under § 2254(d)(1).

In this case, the Seventh Circuit decision heavily relies on a quote from *Smith*: "[d]ue process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith*, 455 U.S. at 217. A close examination of the quoted language reveals that the quote's reference to the timing — "to determine the effect of

such occurrences when they happen" — is not part of *Smith's* holding, but is *dicta.*

In *Smith*, the defendant's petition for federal habeas relief asserted that he had been denied due process under the Fourteenth Amendment. *Id.* at 214. This Court disagreed, noting that the hearing held by the trial court properly investigated the allegation of bias. This Court explained:

> Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in *Remmer* and held in this case.

Id. at 217.

In *Remmer*, the defendant was convicted by a jury in federal court for income tax evasion. 347 U.S. at 228. After the verdict, the defendant learned that an unnamed person had told the jury foreman that the foreman could profit by entering a verdict for the defendant. *Id.* The foreman told the district court judge, who, with the knowledge of the prosecution, but not the defense, requested an FBI investigation. *Id.* The FBI investigated while the trial was proceeding and the FBI's report was given to the prosecution and the district court, but again the defense had no knowledge of the report. *Id.* The court and prosecutors reviewed the FBI report and concluded that the statement was made in jest. The court found no further action was necessary. *Id.*

Remmer moved for a new trial and requested a hearing to determine the effect the investigation may have had on the jury. *Id.* The district court denied the motion without holding a hearing and the court of appeals affirmed. *Id.* at 229. This Court reasoned that the district court should "not decide and take final action *ex parte* on information such as was received in this case, but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." *Id.* at 229-30. This Court vacated and remanded for such a hearing. *Id.* at 230.

Smith and *Remmer* do clearly establish, as the Seventh Circuit opined, that a trial judge must be "ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences" but, in view of *Remmer's* remedy of a hearing well after the alleged prejudicial occurrence and *Smith's* approval of "a hearing like that ordered in *Remmer*," it is difficult to see how this Court's holdings in *Remmer* and *Smith* require a hearing at the time of the occurrence to the exclusion of any other time. Yet the inescapable conclusion in this case is precisely that — the state trial court's failure to hold what the Seventh Circuit deemed an adequate investigation at the time Klitzka made his *voir dire* remarks and the Wisconsin Court of Appeals' subsequent finding that the trial court did not commit error — rendered the state court decision unreasonable. Oswald had a postconviction hearing at which he called a witness and attempted to establish that, as a result of what he believed to be the trial court's inadequate investigation, a biased juror, Schuenke, slipped onto the jury. Such a hearing seems to satisfy the holdings of *Smith* and *Remmer*.

In addition, the Seventh Circuit "distill[ed] the principle that adequacy [of any investigation] is a function of

the probability of bias; the greater that probability, the more searching the inquiry needed to make reasonably sure that an unbiased jury is impaneled." App., *infra*, 8a. The authority the Seventh Circuit cited for its distillation consisted solely of decisions of the courts of appeals, *id.*, perhaps because this Court has never announced this principle. Yet this is the Seventh Circuit's basis for determining that the Wisconsin Court of Appeals' decision to uphold the trial court's more limited inquiry about Klitzka's remarks was objectively unreasonable.

The Seventh Circuit cited *Ham v. South Carolina*, 409 U.S. 524, 525-27 (1973), as supporting its sliding scale inquiry requirement "the greater the doubts, the more probing the inquiry that is required." App., *infra*, 9a. *Ham* involved a claim that the trial court violated due process when it failed to conduct any *voir dire* to determine possible racial prejudice. This Court held that a trial court was obliged to interrogate the jurors on the subject of racial prejudice. *Ham*, 409 U.S. at 526. But the particular form and number of questions was left to the broad discretion of the trial court. *Id.* at 527. Even *Ham's* dicta does not suggest the sliding scale approach the Seventh Circuit used to evaluate the objective reasonableness of the Wisconsin Court of Appeals' decision. The trial court complied with *Ham*'s holding — the trial court was obliged to investigate the subject matter of the possible bias; it was manner and scope of the investigation with which Oswald took issue. And to the extent that *Ham* addresses that issue at all, it leaves the manner and scope of the investigation to the discretion of the trial court.

The Seventh Circuit also cited *Mu'Min v. Virginia*, 500 U.S. 415, 419-22, 430-32 (1991), as supporting its sliding scale inquiry. App., *infra*, 9a. *Mu'Min* involved a case of pretrial publicity such as occurred here. While the

jurors had some knowledge of the pretrial publicity, they testified that they could decide the case based solely on the evidence presented at trial. *Mu'Min*, 500 U.S. at 417. Nonetheless, Mu'Min argued that his right to an impartial jury was violated because the trial court refused to ask the jurors about the nature of the news reports to which they had been exposed. *Id.* Mu'Min also requested the trial to conduct individual *voir dire*, which the court refused. *Id.* at 419. This Court reiterated its holding in *Ham* that the "trial court retains great latitude in deciding what questions should be asked on *voir dire*." *Id.* at 424.

Mu'Min asserted that the due process clause required more on *voir dire* than was done in his case. He argued that the court must do more than merely cover the subject. He claimed that the court must make precise inquiries into the contents of the news reports the potential jurors had read. *Id.* at 424. This Court rejected this claim. It held that, for particular *voir dire* to be "constitutionally compelled ... the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair." *Id.* at 425-26.

Mu'Min's holding does not support the Seventh Circuit's proclamation that "the greater the doubts, the more probing the inquiry that is required." To the contrary *Mu'Min's* holding requires that, for a *voir dire* inquiry to be constitutionally defective, the defendant must establish the questions refused render the trial fundamentally unfair.

Lastly, the Seventh Circuit cited *Turner v. Murray*, 476 U.S. 28 (1986). App., *infra*, 9a. In *Turner*, the defendant, a black man, was convicted of the capital murder of a white man, a jewelry shopkeeper. *Id.* at 29. Turner requested the trial court to ask the prospective jurors "'[t]he defendant, Willie Lloyd Turner, is a member of the Negro race. The victim, W. Jack Smith, Jr., was a white Caucasian.

Will these facts prejudice you against Willie Lloyd Turner or affect your ability to render a fair and impartial verdict based solely on the evidence?'" *Id.* at 30-31. The trial court refused. Both the Virginia Supreme Court on direct appeal and the Fourth Circuit Court of Appeals on review of the denial of habeas relief, upheld the trial court relying on *Ristaino v. Ross*, 424 U.S. 589, 598 (1976) (inquiry into racial prejudice at *voir dire* was not constitutionally required because the facts of the case "'did not suggest a significant likelihood that racial prejudice might infect [the defendant's] trial.'").

The *Turner* court reiterated the holding in *Ristaino* that to warrant the inquiry Turner requested on *voir dire*, special circumstances beyond the fact of a black defendant and a white victim needed to be present. *Id.* at 33. The *Turner* court, however, held the fact the jury was to make a "highly subjective, 'unique, individualized judgment'" in a capital case required the inquiry. *Turner's* holding does not support the Seventh Circuit because Oswald's case is not a capital case.

Certiorari is necessary to clarify that, under 28 U.S.C. § 2254(d)(1), a federal court may not distill principles from the courts of appeals' interpretation of this Court's holdings or rely upon quoted material which does not figure in this Court's holding in order to assess whether a state court decision is objectively reasonable.

II. CERTIORARI IS NECESSARY BECAUSE THE SEVENTH CIRCUIT COURT OF APPEALS DID NOT GIVE THE DECISION OF THE WISCONSIN COURT OF APPEALS THE APPROPRIATE DEFERENCE REQUIRED BY AEDPA.

As relevant here and noted above, 28 U.S.C. § 2254(d)(1) authorizes a federal court to grant habeas corpus relief only when a state court decision "resulted in a decision that ... involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." This Court observed that the language of this section requires that a "state court decision must be objectively unreasonable, not just incorrect or erroneous," to warrant habeas relief. *Lockyer v. Andrade*, 538 U.S. 63, 65 (2003), citing *Williams*, 529 U.S. at 409, 410, 412. The Seventh Circuit held that the Wisconsin Court of Appeals' decision was an unreasonable application of *Remmer* and *Smith*. App., *infra*, 12a.

A state court's decision may be an "unreasonable application" of Supreme Court precedent if the state court either: (1) identifies the correct governing legal rule, but unreasonably applies it to a new set of facts in a way that is objectively unreasonable; or (2) extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable. *Williams*, 529 U.S. at 407-08; *Bell v. Cone*, 535 U.S. 685, 694 (2002). A federal court may not grant habeas relief, even where it "concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly," *Bell*, 535 U.S. at 694, unless the state court

also applied the law unreasonably. *Williams*, 529 U.S. at 410.

This Court has noted that § 2254(d) constitutes a "new, highly deferential standard for evaluating state court rulings." *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997). The 1996 Act modified the role of federal habeas courts "to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell*, 535 U.S. at 693, citing *Williams*, 529 U.S. at 403-04.

Although the Seventh Circuit Court of Appeals recited this Court's standard for an unreasonable application of federal law as determined by this Court's precedents, it did not afford the state court opinion the type of deference Congress envisioned when it adopted § 2254(d)(1)'s language. Rather, it substituted its own independent conclusion that Oswald's right to an impartial jury was violated.

This case was unusual "not only because of the enormous media coverage of the charged criminal activities, but also because of defense counsel's plan to turn the media coverage into a positive factor for his client." App., *infra*, 88a. The media consistently portrayed Oswald as an "impressionable teenager who was victimized by his abusive and manipulating father[.]" The defense strategy, the Wisconsin Court of Appeals noted, was that jurors who had heard and seen the extensive media coverage might be sympathetic to Oswald. App., *infra*, 88a.

Thus, Oswald did not contest the fact that he robbed the banks, engaged in the shootout, took a hostage, and fired the shots fatally wounding a police officer. Oswald's object was not to obtain jurors who had no opinion on whether he

had engaged in those acts, because he was not intending to claim that he was not at the scene or that someone other than he engaged in the shootout. App., *infra*, 88a. "Rather, he was planning to minimize his role by placing responsibility for the crimes on his father. He was looking for jurors who would be open-minded to his defense that his father made him do it." App., *infra*, 17a-18a.

In *Yarborough*, 124 S. Ct. at 2149, this Court opined that

> the range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.

The principle involved in this case was a general one involving "a substantial element of judgment." In *Mu'Min*, this Court observed that "[p]articularly with respect to pretrial publicity, we think [the] primary reliance on the judgment of the trial court makes good sense." *Mu'Min*, 500 U.S. at 427. Thus, even on direct appeal, considerable deference is owed to the trial court's determination of what *voir dire* to conduct and whether a particular juror is biased. In a habeas case, such as this, § 2254(d)(1) further limits the

review of federal habeas courts. The state court decision must be objectively unreasonable. *Lockyer*, 538 U.S. at 75-76.

The Seventh Circuit made its own judgment concerning the possibility of jury bias based on the incidents involving Roger Klitzka and William Schuenke. Contrary to the state courts' conclusion, when Klitzka stated that he had learned things in the conversations with prospective jurors in the waiting room, the Seventh Circuit determined that "this was not just Klitzka's personal opinion .... The implication of what he said was that the entire jury pool had made up its mind that Oswald was guilty," App., *infra*, 5a., and "the circumstances strongly suggested that the jury had made up its mind that Oswald was guilty," App., *infra*, 6a. It concluded that the two instances "demonstrate a high probability that some, maybe all, of the jurors who tried Oswald were biased." App., *infra*, 8a.

The Seventh Circuit also discounted the testimony of the bailiff that he had not heard the jurors talking about the case. The Seventh Circuit concluded the jurors "might have been hesitant to discuss the case—having been instructed not to—in the presence of a court official." App., *infra*, 6a. Certainly the Seventh Circuit's conclusions are reasonable, however, they are not the only reasonable conclusions one can draw from the circumstances of this case.

Against the circumstances recited by the majority of the Seventh Circuit, the dissenting judge pointed out that Schuenke never said that he rejected out of hand Oswald's potential defense of coercion. App., *infra*, 16a. To the contrary, like other jurors, Schuenke said in his questionnaire that he would have a hard time believing that Oswald wasn't involved. But during *voir dire*, he indicated that he meant he would have a hard time believing that Oswald was not

present at the shootout and participated in it. App., *infra*, 17a. And, as both the dissent and the Wisconsin Court of Appeals pointed out, the "heart of the issue" was not the jury's "ability to presume the defendant innocent unless proven guilty of the charges. ... For Oswald, the heart of the issue during voir dire was securing a jury amendable to his coercion defense strategy." App., *infra*, 18a-19a. Schuenke testified he had an open mind with respect to any possible defenses. App., *infra*, 16a. Klitzka did not sit on the jury. App., *infra*, 16a.

As in *Yarborough*, "[o]n one hand, certain facts weigh against a finding that [the panel had formed an opinion that Oswald was guilty]." "Other facts point in the opposite direction." *Yarborough*, 124 S. Ct. at 2149-50. Given the circumstances that Oswald sought jurors who might be sympathetic to his "father made me do it" defense, rather than jurors who were not familiar with any publicity, it was for the trial court and the state courts on appeal to determine whether the conversations concerning Oswald's involvement or "guilt" merited the type of in-depth inquiry the majority of the Seventh Circuit believed should have been performed. While the more prudent course may well have been to conduct such an inquiry, it is at least reasonable that the trial court and the court of appeals believed that discussions about whether or not Oswald was present and participated in the acts were not sufficiently important to his defense to merit an interview of the twenty-five prospective jurors who had already testified that they could be open minded to the coercion defense.

Certiorari is necessary to clarify that, under 28 U.S.C. § 2254(d)(1), a federal court may not second guess a state court decision where the application of this Court's precedents demand a substantial element of judgment.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

PEGGY A. LAUTENSCHLAGER
Attorney General

WARREN D. WEINSTEIN*
Assistant Attorney General
Attorneys for Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9444
* Counsel of Record
October 2004

APPENDIX

APPENDIX

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In the
United States Court of Appeals
For the Seventh Circuit.

THEODORE W. OSWALD,

Petitioner-Appellee

v.

DANIEL BERTRAND

Respondent-Appellant

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 01-C-0182—Lynn Adelman, Judge.

ARGUED NOVEMBER 3, 2003—DECIDED JUNE 29, 2004

Before POSNER, DIANE P. WOOD, and EVANS, *Circuit Judges.*

POSNER, *Circuit Judge*. Oswald, a Wisconsin state prisoner, sought federal habeas corpus after exhausting his state remedies in *State v. Oswald*, 606 N.W.2d 207 (Wis. App. 1999), review denied, 609 N.W.2d 473 (Wis. 2000). The district court found that the state court of appeals had been unreasonable in ruling that the judge who presided at Oswald's criminal trial had conducted a constitutionally adequate inquiry into possible jury bias. 249 F. Supp. 2d 1078 (E.D. Wis. 2003). The state appeals.

Ordinarily it would be clear that the issue for the district court and us would be whether in turning down Oswald's claim of constitutional error the state courts had made "an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the

United States." 28 U.S.C. § 2254(d)(1). But this is only if the prisoner's claim was adjudicated by the state court "on the merits." § 2254(d). If not, the special deference to a state court's determinations that is prescribed by section 2254(d)(1) goes by the board. *Braun v. Powell*, 227 F.3d 908, 916-17 (7th Cir. 2000); *Moore v. Parke*, 148 F.3d 705, 708 (7th Cir. 1998); *Maples v. Stegall*, 340 F.3d 433, 436-37 (6th Cir. 2003). The state appellate court discussed and disposed of Oswald's claim that the jury selection procedure used in his case had denied him an impartial tribunal, but it did not discuss the claim with reference to federal law. No matter. So long as the standard it applied was as demanding as the federal standard, *Mitchell v. Esparza*, 124 S. Ct. 7, 10, (2003) (per curiam); *Early v. Packer*, 537 U.S. 3, 8, (2002) (per curiam); *Reid v. True*, 349 F.3d 788, 799-800 (4th Cir. 2003); *Sellan v. Kuhlman*, 261 F.3d 303, 311-14 (2d Cir. 2001)—and there is no suggestion that it was not, cf. *Hammill v. State*, 278 N.W.2d 821, 822 (1979)—the federal claim is deemed adjudicated on the merits and its rejection therefore entitled in this habeas corpus proceeding to the deference prescribed by section 2254(d)(1).

The nature of Oswald's claim has now to be explained. The due process clause of the Fourteenth Amendment entitles a state criminal defendant to an impartial jury, *Morgan v. Illinois*, 504 U.S. 719, 726 (1992), which is to say a jury that determines guilt on the basis of the judge's instructions and the evidence introduced at trial, as distinct from preconceptions or other extraneous sources of decision. *Patton v. Yount*, 467 U.S. 1025, 1037 n. 12 (1984); *Irvin v. Dowd*, 366 U.S. 717, 721-23 (1961); *United States v. McClinton*, 135 F.3d 1178, 1185-86 (7th Cir. 1998); *United States v. Angiulo*, 897 F.2d 1169, 1182-83 (1st Cir. 1990). In addition—and this is critical—due process requires the trial judge, if he becomes aware of a possible source of bias, to "determine the circumstances, the impact

thereof upon the juror, and whether or not it was prejudicial." *Remmer v. United States*, 347 U.S. 227, 230 (1954); see also *United States v. Thomas*, 463 F.2d 1061, 1063-64 (7th Cir. 1972); *United States v. Humphrey*, 208 F.3d 1190, 1198-99 (10th Cir. 2000); *United States v. Davis*, 177 F.3d 552, 556-57 (6th Cir. 1999); *Howard v. Moore*, 131 F.3d 399, 422 (4th Cir. 1997) (en banc). In *Smith v. Phillips*, 455 U.S. 209, 217 (1982), the Supreme Court put the two points together, saying that "due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." The Court also made clear in *Smith* that while *Remmer* had been a federal prosecution, the duty of inquiry is equally engaged when a defendant is tried in a state court. 455 U.S. at 215, 218; see also *Whitehead v. Cowan*, 263 F.3d 708, 724-26 (7th Cir. 2001); *Evans v. Young*, 854 F.2d 1081, 1083-84 (7th Cir. 1988); *United States v. Bradshaw*, 281 F.3d 278, 289-93 (1st Cir. 2002); *Howard v. Moore*, *supra*, 131 F.3d at 422.

In 1994, Oswald, who was then 18 years old, robbed a bank with his father. Fleeing toward Waukesha by car, they were stopped by two policemen. The two Oswalds, both armed with semi-automatic rifles, shot at the officers, killing one, and continued their flight, in the course of which they took a woman hostage and forced her to drive them in her van. At a police roadblock there was another shootout; the hostage and two officers were wounded, the hostage escaped, and the Oswalds took off in the van; eventually it crashed and they were arrested. The second shootout, the hostage's escape, and the crash of the getaway car were all videotaped, and broadcast throughout the Waukesha area. As the district judge explained, "the case generated an enormous amount of publicity both in the immediate aftermath of the crime and during the period leading up to

the trials of the Oswalds. The serious nature of the offenses, the fact that a local police officer was killed, the existence of the videotape (with its echoes of the O.J. Simpson case) and the fact that the defendants were father and son combined to make the case probably the most notorious in the history of Waukesha County." The widow of the police officer who had been killed initiated a highly publicized petition for reinstatement of the death penalty in Wisconsin. Hundreds of T-shirts and sweatshirts were sold, many to police and prison guards, depicting the crashed van, bearing the legend "Oswald's final mistake was coming to the Town of Pewaukee," and calling for the reinstatement of the death penalty in Wisconsin.

Oswald (the son, the petitioner in our case) was tried separately from his father nine and a half months after their crime spree and was convicted and given the redundant sentence of 565 years in prison consecutive to two life sentences. His father was tried separately and received a comparable sentence. Because of the avalanche of pretrial publicity, Oswald could doubtless have obtained a change of venue had he moved for it, but he did not. His only defense against the criminal charges was that his father had coerced or brainwashed him into participating in the robbery and subsequent mayhem, and, again in the words of the district judge, Oswald's lawyer thought that "because some of the publicity had portrayed him as a victim of his abusive and manipulative father, a local jury might be more receptive to his defense than a jury elsewhere" in Wisconsin.

The court sent jury questionnaires to 156 residents of Waukesha County, more than 80 percent of whom responded that on the basis of the media coverage of the crime they thought that Oswald was guilty. Fifty of the 156 were voir dired, and of those 50, 29 were picked to be the jury pool. Since under Wisconsin law each side would have seven

peremptory challenges (the usual number for crimes punishable by life in prison is six, but since the judge decided to seat three alternates he gave each side one more peremptory challenge, Wis. Stat. Ann. §§ 972.03, .04(1)), if all 14 were used there would still be 15 jurors—12 regulars and the three alternates. Hence the cut to 29.

It took four days to winnow the list down first from 156 to 50 and then from 50 to 29, and during this period the prospective jurors spent all day in a room in the courthouse from which the bailiff would lead them out one by one to be questioned in the courtroom. On the last day, one of the prospects, Roger Klitzka, in the course of being voir dired, said, "I know I've learned more in the last three days here sitting down there in that room about this case than I have since the day that it happened .... [A]ccording to what I hear, the young man is guilty of what he is being accused of and things like that and everything and I just think it's just a waste of time." The judge asked him whether he meant "it's a waste to have the trial at all," and Klitzka confirmed that that was indeed what he meant.

Apparently this was not just Klitzka's personal opinion (he was not selected for the jury). The implication of what he said was that the entire jury pool had made up its mind that Oswald was guilty. We will never know for sure, however, what he meant. Rightly fearing that the prospective jurors had been conducting marathon bull sessions on Oswald's guilt, Oswald's lawyer asked Klitzka to explain what he had heard in these sessions. Klitzka refused to answer, and at the prosecutor's urging the judge refused to direct him to answer. Oswald's lawyer requested the judge to ask the other prospective jurors what had been discussed in the jury room. The prosecutor (who made every possible effort to prevent the judge's determining whether jurors were biased) objected, saying it was "crazy" to think

that the jurors had not discussed the case when they had been sitting "for 4 days in a crowded jury room downstairs" in "a case that everybody other than one juror that we have talked about has seen a videotape concerning probably the highest profiled case in this county in 20 years and not to even think or mention the case or mention how disgusted they are with the process." Apparently the "process" that the prosecutor thought must have disgusted the prospective jurors was the voir dire itself, for he mentioned a prospective juror being "interrogated" and feeling as if "she's on trial."

Even though the circumstances strongly suggested that the jury had made up its mind that Oswald was guilty, the judge refused either to question Klitzka further or to recall for further questioning any of the prospective jurors who had already been voir dired. He did permit Oswald's lawyer to inquire about the discussions in the jury room from the three members of the pool who had not yet been voir dired. The first of the three confirmed that the jurors had been discussing the case; the other two denied having heard other jurors express an opinion—which, of course, doesn't mean that other jurors had not expressed an opinion; those two might not have been listening.

That afternoon the judge, who must by this time have been worried about whether the impartiality of the prospective jurors had been compromised, asked one of the bailiffs responsible for shepherding the jurors what he had overheard in the jury room. The bailiff said he hadn't heard the jurors talking about the case, but added that he had been in the jury room only intermittently. And the jurors might have been hesitant to discuss the case—having been instructed not to—in the presence of a court official.

During the lunch recess that day the judge had gone to the jury room and reminded the prospective jurors not to

discuss the case. On that occasion one of the prospective jurors, William Schuenke, had told the judge: "I really want to talk to you. I had written that letter. It's really important. I don't want to--I'm part of the 29" (who had survived the first stage of the voir dire). In his letter Schuenke had written: "I will more than likely be so concerned about my work that I'd not give in trial all the attention it should receive to the point that I might just vote either way just to end it." Oswald's lawyer, who had seen the letter, wanted to question Schuenke further. The judge refused, though aware that Schuenke's remark to him in the jury room had been heard by the other prospective jurors. The judge knew this because he'd been at the front of the room and Schuenke at the back, with the other jurors in between, yet the judge had heard him, so the jurors must have too. The judge had received notes from three other jurors as well saying they didn't want to serve on the jury. An oral request was relayed to him by a fourth.

When the 29 prospective jurors who had survived the first cut returned to the courtroom, Schuenke had another outburst, saying to the judge in the hearing of the rest of the jury pool, "I asked to speak to you 2 days ago. You mean I can't get five minutes of your time?" The judge told him his request had been addressed, but he replied, "Not to me they weren't you know." Schuenke served on the jury because the defense used up all its seven peremptory challenges on other prospective jurors whom the judge had refused to excuse for cause.

The trial lasted three weeks. The jury, after deliberating for three hours (according to press reports--the information isn't in the record), returned a verdict of guilty on all 19 counts in the indictment.

The circumstances that we have narrated demonstrate a high probability that some, maybe all, of the jurors who tried Oswald were biased. It is not just what Klitzka said or what Schuenke said; those were merely the most dramatic indications that, as the judge obviously realized, the process of jury selection was being poisoned. The question is whether, given the indications of jury bias, the judge's inquiry was adequate. From the case law we distill the principle that adequacy is a function of the probability of bias; the greater that probability, the more searching the inquiry needed to make reasonably sure that an unbiased jury is impaneled. *United States v. Davis*, 15 F.3d 1393, 1412-13 (7th Cir. 1994); *Tracey v. Palmateer*, 341 F.3d 1037, 1044 (9th Cir. 2003); *United States v. Bradshaw*, 281 F.3d 278, 289-90 (1st Cir. 2002); *United States v. Angulo*, 4 F.3d 843, 847 (9th Cir. 1993). The response to the jury questionnaires against the background of enormous publicity concerning the most sensational criminal episode in the county's history, the fact that Oswald seemed so obviously guilty as to make the necessity for a trial questionable to a layperson, the tumult induced by Schuenke's vocal complaints, the flagrant disobedience of the judge's instructions that the prospective jurors not discuss the case in advance of the trial, the likelihood that Schuenke and perhaps other reluctant jurors would vote to convict regardless of their actual views if that would make the trial end quicker, the fact that, at least according to Klitzka, the improper discussions had already produced a consensus that Oswald was guilty as charged--these things, taken not separately but together, created a sufficiently high probability of jury bias to require on the part of the trial judge a diligent inquiry.

The inquiry he conducted did not satisfy that standard. Reminding the jurors not to discuss the case after they had been discussing it for four days was a case of closing the barn door after the horse had escaped.

Questioning one of the bailiffs (and why just one?) was not likely to elicit much useful information about the mood and mindset of the prospective jurors. Allowing Oswald's lawyer to question just three of the prospective jurors about conversations in the jury room was arbitrary, especially since by cutting off the questioning of Klitzka the judge had made clear that he wouldn't permit follow-up questions. The bobtailed inquiry that the judge conducted flunked the constitutional test that "the investigation be reasonably calculated to resolve the doubts raised about the juror's impartiality." *Dyer v. Calderon*, 151 F.3d 970, 974-75 (9th Cir. 1998) (en banc); see also *Mu'Min v. Virginia*, 500 U.S. 415, 419-22, 430-32 (1991); *United States v. Beckner*, 69 F.3d 1290, 1291-94 (5th Cir. 1995); *United States v. Boylan*, 898 F.2d 230, 257-59 (1st Cir. 1990); cf. *Turner v. Murray*, 476 U.S. 28, 35-36 (1986) (plurality); *Ham v. South Carolina*, 409 U.S. 524, 525-27 (1973). To repeat, the greater the doubts, the more probing the inquiry that is required.

It is true that by refusing to move for a change of venue, the defense lawyer may have been trying to game the system. Wisconsin law forbade the judge to order a change of venue on his own or the prosecutor's motion. Wis. Const. art. 1, § 7; Wis. Stat. §§ 971.19(1), 971.22; *State v. Bangert*, 389 N.W.2d 12, 34-35 (1986); *State v. Mendoza*, 258 N.W.2d 260, 266-69 (1977). Oswald's best hope may have been that the trial might founder on inability to impanel an impartial jury in the county in which the crime had been committed. It is difficult to see how Oswald could prevail with his Patty Hearst or Manchurian Candidate defense. Defenses such as self-defense, public and private necessity, and coercion are not intended for cases in which a person kills an innocent to save his own hide, as when the shipwrecked defendants in the famous case of *Regina v. Dudley & Stevens*, 14 Q.B.D. 273 (1884), ate the cabin boy

rather than starve, and were convicted of murder. See also *United States v. Buchanan*, 529 F.2d 1148, 1153 (7th Cir. 1975); *United States v. LaFleur*, 971 F.2d 200, 204-06 (9th Cir. 1991); *Henry v. State*, 586 So.2d 1033, 1036 n. 6 (Fla. 1991) (per curiam), vacated on other grounds, 505 U.S. 1216 on remand, 613 So.2d 429 (Fla. 1992); *Amin v. State*, 811 P.2d 255, 260 (Wyo. 1991); *United States v. Holmes*, 26 Fed. Cas. 360, 366- 68 (C.C.E.D.Pa.1842) (No. 15,383); *State v. Cooper*, P.2d 745, 748 (N,M, App. 1999); *State v. Soine*, 348 N.W.2d 824, 826 (Minn. App. 1984); *State v. Banks*, 539 P.2d 173, 175 (Ariz. App. 1975); 2 Wayne R. LaFave, *Substantive Criminal Law* §§ 9.7, 10.1(c), 10.4(g), pp. 72, 123-24, 157- 58 and n. 82 (2d ed. 2003). Wisconsin law permits a murderer to plead coercion as a complete defense, provided he didn't commit first-degree murder, Wis. Stat. Ann. § 939.46(1)—and for reasons unknown Oswald was not charged with first-degree murder though he was tried for conspiracy to commit intentional homicide. But there is an exception to the right to plead coercion if the coercion was by the defendant's coconspirator, *id.*, which is the only possibility here. In fact Oswald's theory is that he was brainwashed by his father into committing the crimes. That is why we mentioned The Manchurian Candidate, the movie based on a novel by Richard Condon in which Laurence Harvey is brainwashed by the Chinese Communists into becoming an assassin narrowly prevented from killing a Presidential candidate by Frank Sinatra.

If brainwashing is just a form, a particular instantiation, of the defense of coercion, it is barred by the conspirator exception; if brainwashing is a separate defense, it probably is not recognized by the law, see Joshua Dressler, "Professor Delgado's 'Brainwashing' Defense: Courting a Determinist Legal System," 63 *Minn. L. Rev.* 335 (1979); and if it is merely an effort to show that Oswald was somehow incapable of forming an intent to kill, it would be

highly unlikely to persuade a jury. It is less surprising that the jury rejected Oswald's defense than that it was submitted to the jury in the first place. The reason for the judge's doing so, as far as we can determine, is that Oswald denied that he had conspired with his father—again something that it is difficult to imagine a jury accepting.

But even if Oswald is certain to be convicted if he is retried, this cannot justify our reversing the grant of his petition for habeas corpus. Even a clearly guilty criminal is entitled to be tried before an impartial tribunal, something the jurors in this case may well have failed to understand. *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991); *Irvin v. Dowd*, *supra*, 366 U.S. at 722; *Tumey v. Ohio*, 273 U.S. 510, 535 (1927); *United States v. Spears*, 558 F.2d 1296, 1297 (7th Cir. 1977); *Coleman v. Kemp*, 778 F.2d 1487, 1540-41 (11th Cir. 1985); *United States v. Essex*, 734 F.2d 832, 845-46 (D.C. Cir. 1984); *State v. Baumruk*, 85 S.W.3d 644, 650-51 (Mo. 2002). It is one of the handful of rights of a criminal defendant that is not subject to the doctrine of harmless error. For others see *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986) (plurality) (racial discrimination in the selection of the grand jury); *Waller v. Georgia*, 467 U.S. 39, 49-50 and n. 9 (1984) (right to a public trial); *McKaskle v. Wiggins*, 465 U.S. 168, 177 n. 8 (1984) (right to self-representation); *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963) (right to counsel).

We explained the thinking behind these exceptions to the rule that harmless errors do not vitiate criminal convictions in *Walberg v. Israel*, 766 F.2d 1071, 1074 (7th Cir. 1985): "If the police, after arresting Walberg and obtaining an eyewitness identification of him plus his confession, had taken him directly to the penitentiary on the ground that a trial would be a waste of time for someone so patently guilty, he would be entitled to release on habeas

corpus; he would have been deprived of his liberty without due process of law. The Constitution requires (unless the defendant waives his rights) a certain modicum of adversary procedure even if the outcome is a foregone conclusion because the evidence of guilt is overwhelming." Oswald was entitled to be tried by a jury that undertook to decide his guilt on the basis of the evidence rather than of what they had learned from the pretrial publicity about the case and analyzed over a four-day period while waiting for the trial to begin. It was natural that having seen the videotape of Oswald's crimes, laypersons would assume his guilt was open and shut. But a jury that decides guilt before the trial begins is little better than a lynch mob.

The state appellate court's condonation of the lack of a minimally timely, minimally adequate, investigation was an unreasonable application of *Remmer v. United States* and *Smith v. Phillips* and is therefore subject to correction in this habeas corpus proceeding. It is not as if the state appellate court had given reasons for its decision that, even if we did not find them persuasive, we could not pronounce unreasonable. A state court can of course be wrong without being unreasonable, and the reasonableness of a decision ordinarily cannot be assessed without considering the quality of the court's reasoning, cf. *Middleton v. McNeil*, 124 S. Ct. 1830, 1832-33 (2004) (per curiam); *Price v. Vincent*, 538 U.S. 634, 641-43 (2003); *Woodford v. Visciotti*, 537 U.S. 19, 24-27 (2002) (per curiam), though the ultimate question, as we emphasized in *Hennon v. Cooper*, 109 F.3d 330, 334-35 (7th Cir. 1997), is not whether the state court gets a bad grade for the quality of its analysis but, as the statute says, whether the decision is an unreasonable application of federal law as stated by the U.S. Supreme Court to the facts.

The appellate court's discussion of the jury selection issue, like the trial court's investigation, was perfunctory. It

is true that the discussion takes up a number of pages in the appellate court's opinion. But most of them address two issues that are peripheral to the question of the adequacy of the trial court's investigation. The first is the accuracy of the testimony of one prospective juror about the discussions in the jury room, a witness whom the district court found credible though the state courts had not. The second is whether Schuenke had lied in answering a question put to him in the voir dire. We assume without having to decide that the state courts resolved these issues correctly; neither the testimony of the prospective juror in question, nor Scheunke's alleged lie, figured in our narrative of the process by which the jury was selected. The appellate court did say, in addition, that Oswald failed to prove that Scheunke was prejudiced against him, and this may be true; but Oswald was not given a chance to prove it--the inquiry into Scheunke's prejudice was too truncated. As far as the narrative of the jury selection process is concerned, the accuracy of which is not in question, the state appellate court said nothing beyond the naked conclusion that the judge had done enough. It mentioned Klitzka's answers, but did not address their bearing on the issue of jury prejudice. The state does not argue that Oswald failed to present his constitutional claim in his state appeal, and so the sparseness of the state appellate court's analysis cannot be excused on that ground.

The fact that Oswald had a chance to present evidence at a postconviction hearing does not alter our conclusion that he was denied due process of law. The single sentence in its opening brief that the state devoted to the adequacy of that hearing is inadequate to preserve the issue in this court; it has been waived. In any event we don't think the postconviction hearing would dissolve Oswald's constitutional claim even if the issue had been preserved. When the issue of jury bias does not arise until

after trial and conviction, the trial judge cannot be faulted for having failed to investigate it, and a postconviction hearing is an inevitable and authorized substitute. *Rushen v. Spain*, 464 U.S. 114, 119 (1983) (per curiam); *Smith v. Phillips*, *supra*, 455 U.S. at 215-18; *id.* at 221-24 (concurring opinion); *Owen v. Duckworth*, 727 F.2d 643, 646 (7th Cir. 1984) (per curiam); *Fitzgerald v. Greene*, 150 F.3d 357, 364-65 (4th Cir. 1998); cf. *United States v. Bishawi*, 272 F.3d 458, 462-63 (7th Cir. 2001). But as *Dyer v. Calderon*, from which we quoted earlier, makes clear, if the issue does surface during, or in this case before, trial, it is the trial judge's responsibility to conduct an adequate investigation, given the unsatisfactory character of an inquiry into jury bias after the trial is over and the defendant convicted. Compare *United States v. Bradshaw*, *supra*, 281 F.3d at 289-93; *United States v. Angiulo*, *supra*, 897 F.2d at 1183-86. Having invested time in the trial and voted to convict the defendant, jurors are unlikely to acknowledge bias, or even to remember the particulars of the discussions that they had had of the case before it was tried--their recollections are likely to be overshadowed by what they learned about the case during the trial. That is why cases such as *Bradshaw* and *Angiulo* stress the importance of a prompt determination, by the trial judge, at the jury-selection stage. Obviously if the problem arises or is discovered later, it must be dealt with later; that is all that cases like *Rushen* allow.

The order of the district court that Oswald be either retried or released is therefore

AFFIRMED.

EVANS, *Circuit Judge*, dissenting. The majority, in bolstering its decision, draws on an example we mentioned in *Walberg v. Israel*, 766 F.2d 1071 (7th Cir. 1985), observing that if police have an airtight case they

nevertheless cannot take an obviously guilty defendant "directly to the penitentiary on the ground that a trial would be a waste of time for someone so patently guilty." But is this what happened here? No. Is this even remotely close to what happened here? No, again. Fifty prospective jurors were questioned over 4 days; the state trial judge granted 21 out of 27 of Oswald's challenges for cause of potential jurors; the jury heard from numerous witnesses and examined many exhibits during the 3 weeks it took to complete the trial. Yet today, the court orders new tickets to this old show for reasons that, in my view, cannot support such a drastic step.

I agree with the majority's announcement that AEDPA requires us to grant deference, under 28 U.S.C. § 2254(d)(1), to the 1999 decision of the Wisconsin Court of Appeals rejecting Oswald's direct state appeal. *State v. Oswald*, 606 N.W.2d 207. But after making that determination, the majority proceeds first to offer its independent view of the facts involving the jury selection process. It then concludes that the Wisconsin Court of Appeals' "condonation of the lack of a minimally timely, minimally adequate, investigation was an unreasonable application of *Remmer v. United States* and *Smith v. Phillips*, and is therefore subject to correction in this habeas corpus proceeding." Why is the Wisconsin court's conclusion unreasonable? The answer seems to be that the majority considers the state court's discussion of the issue to be "perfunctory." This is where the majority loses me. Giving the Wisconsin Court of Appeals' decision the deference to which it is due under AEDPA, I cannot agree that it was either perfunctory or unreasonable. I would not order a do-over of Oswald's trial.

The majority takes the drastic step of ordering a retrial because it detects problems in the jury selection

process based on statements made by two potential jurors. First, it is troubled by the statement of prospective juror Roger Klitzka during voir dire. Klitzka, however, never made it into the jury box for the trial. And his statement that potential jurors were "discussing the case" (whatever that means--it could cover things like how long the trial will take and whether or not the jury would be locked up) found no support, as the majority notes, from two of the three potential jurors who were subsequently asked about it. More importantly, his statement about waiting room conversations does not, in my view, cast doubt on the willingness of the jurors actually selected for service to give Oswald a fair shake on his defense.

Second, the majority is concerned about juror William Schuenke who, like a lot of people summoned for what will be lengthy jury service, preferred to be elsewhere. He said he was "concerned about my work" and might not be able to give the "trial all the attention it should receive ...." Schuenke never said he rejected out-of-hand Oswald's potential defense of coercion. He was asked, "Do you feel like you have an open mind with respect to any possible defenses that I might offer for my client?" His answer was "Yeah." The follow-up question was, "I guess that's all I'm trying to find out is whether based on what you've read or heard you feel that there's something you wouldn't listen to or wouldn't even consider if it was evidence in the case?" The answer: "No."

From the minor problems with Klitzka and Schuenke, mere snippets of events over a 4-day period, the majority jumps to the unfounded conclusion that there is "a high probability that some, maybe all, of the jurors who tried Oswald were biased." On this flimsy foundation, the majority strains to build a case for requiring a retrial.

From what the majority says, one might conclude that the Wisconsin Court of Appeals brushed off the issue involving juror bias with a paragraph or two. The fact is that the court spent 18 pages on jury issues. I would be the last person to say the length equals quality, but length certainly seems to indicate a lack of perfunctoriness. Unlike my colleagues, the Wisconsin court discussed in some detail the postconviction hearing on Oswald's motion for a new trial, which included the jury issue.

The Wisconsin Court of Appeals set the matter in context, noting that this was an unusual case "not only because of the enormous media coverage of the charged criminal activities, but also because of defense counsel's plan to turn the media coverage into a positive factor for his client." The media consistently portrayed Oswald as an "impressionable teenager who was victimized by his abusive and manipulating father." The defense strategy, the court said, was that jurors who had heard and seen the extensive media coverage might be sympathetic to him. Given the facts of this case, I can't disagree with Oswald's lawyer's belief that sympathy, although at best a Hail Mary defense, was probably his client's best chance for any sort of success.

Oswald's focus during the jury selection process was not on whether the prospective jurors thought that he was "involved," to use the carefully chosen words of Juror Schuenke, or "guilty," meaning much the same as "involved" to lay jurors. In fact, a videotape showing much of the drama was going to be presented as evidence at trial. Oswald was not going to claim that he was sitting in the bleachers at Wrigley Field at the time of the shoot-out. He was not going to argue that a twin brother, not he, was "involved." Rather, he was planning to minimize his role by placing responsibility for the crimes on his father. He was looking for jurors who would be open-minded to his defense

that his father made him do it. For instance, a juror was asked whether her feelings would prevent her "from considering a defense of coercion if the Judge instructed [her] to consider it?" Whether that strategy would work is not an issue for us, yet I certainly agree with the majority's observation that any such "Manchurian Candidate" defense would be "highly unlikely to persuade a jury."

Given Oswald's trial strategy, the decision not to request a change of venue becomes explicable. One juror, no doubt, gave the defense hope that the strategy might possibly work. During voir dire, she said that she and her husband were "talking about the possible defense and the fact that, you know, the father having abused or having mentally abused ...." If the media coverage had, in fact, been a positive factor for Oswald, it would have been a strong one; nearly all of the 156 prospective jurors who received questionnaires had even seen a television videotape of the shoot-out.

Given that Oswald's strategic choice was to keep this very high-profile trial in Waukesha County, it would have been absurd for him to think he could find jurors who could truthfully say they had not seen the videotape showing him in the van during the shoot-out. It would also be absurd to think that it would be possible to find honest potential jurors who, based on their viewing of the tape, did not think that Oswald was "guilty" *in the sense that laypersons use the term "guilty"*. On this issue, the reasoning of the Wisconsin Court of Appeals bears repeating:

> In his brief, Oswald claims that all the prospective jurors expressed strong opinions that he was guilty. These opinions, he argues, go "straight to the heart of the issue: their ability to presume the defendant innocent

> unless proven guilty of the charges." However, the facts and circumstances of this case reveal that this statement is incorrect. For Oswald, the heart of the issue during voir dire was securing a jury amendable to his coercion defense strategy. As a part of this strategy, Oswald was opting not to contest his participation in the crimes. His tactical decision was not to protest his guilt. This strategy involved searching for a particular type of juror; this ideal juror would not presume that Oswald was innocent but would be influenced by the media coverage and also could be supportive of a coercion defense. The particular type of juror that Oswald sought is an important circumstance surrounding the voir dire.

In addition, prospective juror after prospective juror was asked whether he or she could "set aside whatever it is that you may have already heard or seen that you know is out there someplace, could you set aside that and deal only with what is presented during the trial?" The answers varied from a forthright "yes" to more thoughtful answers indicating that the juror would try or would hope that he could. Reading the transcript, one senses the struggle that the prospective jurors were going through in their attempt, at least in many cases, to give honest answers. To now look at the cold record and say that they knew too much should not be sanctioned by this court.

As to specific alleged juror misconduct, the defense was given a full opportunity to explore the issue at a postconviction hearing. But all that was offered in the way of evidence was the testimony of one prospective juror (Jacqueline M.) who was stricken from the panel. The trial

court found that she was not credible for several reasons, including the fact that she had given several false answers on her juror questionnaire. The Wisconsin Court of Appeals discussed the testimony at some length and set out the reasons for the finding that it was incredible. It then upheld the trial court's conclusion that a new trial was not warranted. Even if some judges on this court disagree with that conclusion, it seems to me that it is hard to say it is "unreasonable" under AEDPA. After all, "compelling institutional considerations" require that we afford deference to the trial court as it has the primary responsibility to evaluate possible influence on the jury. *Arizona v. Washington*, 434 U.S. 497 (1978). The state trial court, backed up by the Wisconsin Court of Appeals, did not make an unreasonable call.

Supreme Court cases make clear that, even before AEDPA, a state court's findings are entitled to deference. In *Patton v. Yount*, 467 U.S. 1025 (1984), during voir dire, a juror and two alternates expressed that they would have required evidence to overcome their beliefs that the defendant was guilty. The trial judge asked if they could set aside that opinion and accepted their answers that they could. The Court applied the presumption of correctness to the trial court's resolution of the issue. Interestingly enough, the Court also noted that potential jurors are people who are unused to being questioned by lawyers in court and "cannot be expected invariably to express themselves carefully or even consistently. Every trial judge understands this, and under our system it is that judge who is best situated to determine competency to serve impartially." At 1039. In this case, federal appellate judges sitting in Chicago should be slow to condemn the factual determinations of a state circuit judge in Waukesha County, Wisconsin-- a judge who presided over a lengthy 4-day jury selection process in a high

profile, high publicity case kept in the county as a result of a strategic defense decision not to try and have it moved.

Smith v. Phillips, 455 U.S. 209 (1982), involved a juror who had applied to be an investigator in the prosecutor's office, a fact the prosecuting attorneys found out during trial but withheld from the court. A hearing was held after trial, and the judge found no evidence suggesting a sinister motive on the part of the juror, which would have disqualified him. When the case came to federal court, the district court granted the petition for a writ of habeas corpus and the Court of Appeals affirmed (but on different grounds). The Supreme Court found the hearing held by the state trial court to be sufficient:

> [D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. The safeguards of juror impartiality, such as voir dire and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.

At 217, 102 S.Ct. 940.

I do not minimize the duty of the trial judge to be vigilant to juror misconduct. I do, however, believe that we must pay more than lip service to the commands of AEDPA.

The Supreme Court has rather clearly said that alleged juror misconduct and the response of the trial judge cannot be evaluated in a vacuum. We need to be mindful of the context in which the trial judge is operating and to keep our eyes on the facts which are at issue. This trial judge was not asleep at the wheel, and the Wisconsin Court of Appeals was not so cavalier as the majority would have us believe. As far as I can see, the panel of jurors that heard this case--especially given the fact that young Oswald never contested his physical participation in this insane crime spree-- was not poisoned. My colleagues' conclusion to the contrary is regrettable. I respectfully dissent.

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF WISCONSIN

THEODORE OSWALD,
Petitioner,

v. **Case No. 01-C-0182**

DANIEL BERTRAND,
Respondent.

DECISION AND ORDER

Theodore W. Oswald, a Wisconsin state prisoner, petitions for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his conviction of nineteen offenses in Waukesha County Circuit Court in 1995, for which he was sentenced to 565 years in prison consecutive to two life sentences (in addition to ten years to be served concurrently).

Petitioner was charged with and convicted of three counts of party to the crime of aiding and abetting an armed robbery while concealing identity; one count of party to a conspiracy to commit first-degree intentional homicide by using a bulletproof vest and a dangerous weapon plus one count of an attempt of the same crime; one count of party to the crime of aiding and abetting the armed taking of a vehicle without consent using a bulletproof vest; one count of party to the crime of aiding and abetting armed burglary using a bulletproof vest; one count of party to the crime of aiding and abetting the armed taking of hostages by force or threat using a bulletproof vest; one count of party to the crime of aiding and abetting the armed operation of a motor vehicle without consent using a bulletproof vest; eight counts

of party to the crime of aiding and abetting attempted first-degree intentional homicide using a bulletproof vest and a dangerous weapon; one count of party to the crime of aiding and abetting first-degree recklessly endangering safety using a bulletproof vest and a dangerous weapon. State v. Theodore Oswald, 232 Wis. 2d 62, 67 n. 2, (Ct. App. 1999).

Petitioner unsuccessfully sought post-conviction relief in the trial court and then appealed to the state court of appeals. The court of appeals did not immediately decide the case but rather certified it to the state supreme court. However, the state supreme court refused to accept certification and returned the case to the court of appeals. The court of appeals then affirmed the conviction; and the state supreme court denied petitioner's request for review.

In his habeas petition, petitioner claims that: (1) his constitutional rights to due process and an impartial jury were denied because the trial court failed to adequately inquire into questions concerning juror bias that arose during jury selection; (2) his constitutional rights to due process and an impartial jury were denied because a biased juror served on the jury; (3) his constitutional rights to due process and an impartial jury were denied because the state courts arbitrarily deprived him of statutory rights relating to jury selection; and (4) his right to effective assistance of counsel was denied as the result of his trial counsel's inadequate handling of a possible insanity defense.

I. FACTS

A. Background Facts

Petitioner, who was eighteen years old at the time, robbed a bank with his father, James H. Oswald, in Wales, Wisconsin on the morning of April 28, 1994. They fled and

traveled toward Waukesha. Two City of Waukesha police officers stopped the Oswald vehicle, at which point the Oswalds, armed with semi- automatic rifles, got out of the vehicle and shot at the officers, killing one. A chase ensued during which the Oswalds forced their way into a private residence, took a woman hostage and forced her to drive them away in her vehicle. The chase ended in a shootout between the Oswalds and numerous police officers in which two officers and the hostage sustained gunshot wounds. By the time of the shootout, the local media had learned of the incident, and the shootout, the escape of the hostage and the crash of the getaway vehicle were filmed live and rebroadcast extensively. State v. James H. Oswald, 232 Wis. 2d 103 (Ct. App. 1999).

The case generated an enormous amount of publicity both in the immediate aftermath of the crime and during the period leading up to the trials of the Oswalds. The serious nature of the offenses, the fact that a local police officer was killed, the existence of the highly unusual videotape (with its echoes of the O.J. Simpson case) and the fact that the defendants were father and son combined to make the case probably the most notorious in the history of Waukesha County.

Petitioner was tried separately from his father. Petitioner's trial commenced on February 13, 1995, about ten-and-a-half months after the offenses were committed. His defense was that his father coerced his participation in the offenses. Under Wisconsin law, coercion is a complete defense to any criminal charge except first-degree intentional homicide, in which case it reduces the offense to second-degree intentional homicide. Wis. Stat. § 939.46(1). Petitioner did not request a change of venue, theorizing that because some of the publicity had portrayed him as a victim

of his abusive and manipulative father, a local jury might be more receptive to his defense than a jury elsewhere.

Questionnaires were sent to 156 jurors. More than eighty percent responded that, based on media coverage of the events, they believed that petitioner was guilty. The effect of the publicity was reflected in some of their comments. Six jurors suggested a trial would be a waste of taxpayers' time and money. Five expressed concern about their personal security because the offenses occurred so close to home. Nine said petitioner should have either died in the crash or should receive the death penalty if it were available.

In the months before trial, the widow of the police officer who was killed initiated a highly-publicized petition drive to have the death penalty reinstated in Wisconsin. About a month before the trial began, she submitted a petition with 4,000 signatures to the legislature. One of the jurors indicated that she had signed the petition.

Of the more than 150 jurors summoned to the voir dire, fifty were questioned. The plan was to obtain a pool of twenty-nine from which peremptory challenges would be exercised so that there would be three alternate jurors; and each party would have seven peremptory strikes.

I will state the remaining facts by categorizing them according to the claim to which they relate, although some facts relate to more than one claim.

B Facts Relating to Claim That Trial Court Failed to Adequately Inquire Into Questions Concerning Juror Bias That Arose During Jury Selection

Jurors gathered in a jury assembly room in the courthouse. From the jury assembly room, a bailiff escorted

them to the courtroom where the court and counsel questioned each individually. On several occasions, the court instructed jurors not to discuss the case among themselves.

Late in the morning of the fourth day of jury selection, juror Roger Klitzka told the court and counsel that he did not know much about the case before coming to court, but that he had learned much from other jurors. He stated that:

> I know I've learned more in the last three days here sitting down in that room about this case than I have since the day that it happened .... according to what I hear, the young man is guilty of what he is being accused of and things like that and everything and I think it's just a waste of time.

(App. to Pet'r's Mem., hereinafter "App.," at 507-08.)

Klitzka also said that as the result of the information he had received from other jurors, he concluded that the trial would be a waste of time. This is reflected in the following colloquy with the court:

> Q That it's a waste of time to have the trial at all?
> A. Yes.
> Q. The--you understand that an individual who is charged with crimes or criminal activity is entitled and has a right to have a trial and to require the state prove that he committed whatever he's charged with?
> A. Yes. I understand it, but I was just giving you my opinion on it.

(Id. at 508.)

Neither the court nor the prosecutor asked Klitzka any follow-up questions about his disclosure that jurors were talking about the case in the jury assembly room. After the court completed its questioning of Klitzka, the prosecutor asked him whether he could keep an open mind; and Klitzka responded that everything that he heard was hearsay and that "if you can come up with actual evidence and things like that, yes sir." (Id. at 516.)

Petitioner's counsel then attempted to follow up on Klitzka's statement about conversations in the jury assembly room, stating: "I'm somewhat concerned that you've heard a lot about this case in the last 3 days and ... I'm wondering if you could tell us specifically what types of things you've heard about the case"? Klitzka responded: "No, I won't tell you that." (Id. at 519.) Petitioner's counsel then asked for a sidebar at which he stated:

> Judge, I'm very concerned Mr. Klitzka told us that he's obtained almost all of his information on this case in the last 3 days and he refused to answer my inquiry on that issue.... If he's been getting his information in the past 3 days, first of all, he's in violation of--of the court's order not to discuss it .... Now, if it was inadvertent or minimal I suppose that could be understandable and excusable, but to have no opinion before Monday that I'm aware of and then to form a strong opinion that he's--that Mr. Oswald is guilty based on what he's heard in the last 3 days is very troubling to me so I would ask the court to call Mr. Klitzka back and I would ask the court to inquire specifically

> concerning these matters and inform Mr. Klitzka that he's required to provide this information.

(Id. at 521-22.)

The prosecutor objected arguing that the question would intrude "into his [Klitzka's] privacy" and involved a matter that was "none of his [petitioner's counsel's] business." (Id. at 523-25.) Petitioner's counsel responded that:

> [t]he clear implication is that he received it [information] from other jurors, other potential jurors, which is very troubling because that means that there's more than one that's not been following the court's order .... He's not willing to reveal what his information is. It's impossible for me to probe for bias in a meaningful way. He has simply shut down on giving out information ....

(Id. at 525-26.)

The court upheld the prosecutor's objection and declined to require Klitzka to answer additional questions about the communications in the jury assembly room. It also declined petitioner's request to strike Klitzka for cause.

Petitioner's counsel then asked the court to inquire of the other jurors about what they might have heard in the jury assembly room, stating:

> I think it's necessary that an inquiry be conducted of the other juror members whether the case has been discussed. I'm very

> concerned that information is now being spread to the jurors in this case from some source apparently within their own numbers about opinions on this case concerning guilt or innocence and I think there's enough evidence at this point in the record to suggest that's taking place and of course that taints the entire jury process, and I think it's incumbent upon the court to investigate that matter and the--in the way it determines to be appropriate. I don't think we can ignore Mr. Klitzka's claims.

(Id. at 531.)

The prosecutor objected to questioning any of the approximately twenty-five jurors who had already been qualified to be in the pool of twenty-nine:

> Whether or not any of the jurors have discussed the facts of this case, what do we expect these individuals to do? I mean, this is crazy to have these individuals come in here for 4 days and sit for 4 days in a crowded jury room downstairs on a--on a case that everybody other than one juror that we have talked about has seen a videotape concerning probably the highest profiled case in this county in 20 years and not to even think or mention the case or mention how disgusted they are with the process.

(Id. at 532.)

Petitioner's counsel then suggested that, if the court first questioned Klitzka in greater detail, it might learn

whether it was necessary to question other jurors. However, the court denied petitioner's counsel's requests to question Klitzka and/or any jurors who had already undergone voir dire about the statements in the jury assembly room, but said that it would permit him to inquire about the matter with the few jurors who remained to be questioned.

The next juror to be questioned was Susan Beers. Petitioner's counsel asked her whether jurors were talking about the case in the jury assembly room, and the following colloquy ensued:

> A. Well, people have their opinions ....
> Q. People in the courthouse or other jurors?
> A. Well, other jurors.
> Q. Have other jurors either expressed to you opinions or tried to convince you about anything?
> A. No, no. Not tried to convince but they had their opinions and, you know, but umm, you know, you don't know how serious they are about what they're saying either.
> Q. Like what type of things have you heard?
> A. Umm, well, I don't know how to say-- well, they will just say it's guilty, you know, right off the top of their head.

(Id. at 412.) Beers stated that jurors had expressed this opinion "all during the 4 days," but that she had not been influenced by them. (Id. at 413.)

The prosecutor then stated:

> Judge, I think we need to act on that immediately even though we have only one juror left we may have to deal with this in a much more deeper fashion, ... the sooner the better that they are [told] not to talk, expose themselves to other jurors, elicit opinions or even remotely consider anything having to do with this case. I'm not sure how you can make it any more encompassing than that. Maybe we failed to do that. I didn't think we needed to.... hopefully there's been no harm done.

(Id. at 417.)

Petitioner's counsel reiterated his concern that jurors who had already been qualified to be in the pool of twenty-nine might have made or been biased by the improper communications and again requested that the court question Klitzka and/or the jurors to determine if the pool included biased jurors. However, the prosecutor objected, and the court denied the request. The court granted the prosecutor's request that it go to the jury assembly room during the noon recess and re-instruct jurors not to discuss the case.

The court and counsel then questioned Robert Leonard and Eleanora Jorgenson, the last jurors to be questioned, and neither reported having heard other jurors express opinions about the case.

During the noon recess, the judge went to the jury assembly room and re- instructed jurors not to talk about the case. In the jury assembly room, juror William Schuenke said to the judge: "I really want to talk to you. I had written that letter. It's really important. I don't want to--I'm part of the 29." (Id. at 314.)

After the recess, the court and counsel reconvened in the courtroom. At petitioner's counsel's request, the court heard testimony from Addison Steady, one of the bailiffs responsible for the jurors. He testified that he had not heard jurors talking about the facts of the case but said that he was present only on the third and fourth days of voir dire and was in the jury assembly room only when he was not escorting jurors to and from the courtroom.

The court then indicated that four jurors had written notes asking to be excused. In discussing how to handle the requests, the court advised counsel of Schuenke's statement in the jury assembly room, stating that Schuenke "was in the back of the room, there was very little question the comment was heard by everybody else that was in the room as I was in the front of the room." (Id. at 317.)

The prosecutor asked the court to deny the jurors' requests to be excused. However, based on the content of his request, petitioner's counsel asked the court to remove Schuenke for cause or, alternatively, to permit further questioning of him. Petitioner's counsel pointed out that in his letter Schuenke wrote: "I will more than likely be so concerned about my work that I'd not give the trial all the attention it should receive to the point that I might just vote either way just to end it." (Id. at 322.) Petitioner's counsel argued that Schuenke's letter showed that he was

> a juror that's basically saying they can't take their responsibility seriously. I mean if ... they can't fulfill their duty despite the instructions and ... they're not going to vote their conscience and listen to the evidence and deliberate according to law, obviously ... some further inquiry or record [is required].

(Id.)

Petitioner's counsel added that without questioning Schuenke further, he had no way of knowing whether Schuenke would be a conscientious juror, and that he could not meaningfully determine whether to use one of his peremptory strikes to remove him. Petitioner's counsel noted that the court had already denied seven of his challenges for cause, and that he had planned to use his seven peremptories to strike the jurors who he had unsuccessfully challenged, and that, if he did, he would have no strike to exercise on Schuenke, a juror who said that he might not decide the case on the evidence.

The prosecutor responded that he shared some of petitioner's concerns but feared that further questioning might lead to the loss of jurors. However, he said that he would leave the matter up to the court. The court then declined to remove Schuenke for cause or to permit further questioning of him about the letter.

The court also addressed a letter from juror George Schroeder, who had said on voir dire that he could set his opinion aside and consider the evidence, but stated in his letter that he now believed that petitioner was guilty, and that he could not be unbiased. The court agreed to further questioning of Schroeder but declined petitioner's request to inquire whether communications from other jurors caused Schroeder to change his mind.

The court returned the twenty-nine jurors comprising the pool to the courtroom and advised them that the requests to be excused had been considered. At this point, Schuenke said to the judge: "I asked to speak to you 2 days ago. You mean I can't get five minutes of your time?" (Answer to Pet.

Ex. B2 at 216-17.) The court again advised Schuenke that the requests had been addressed. Schuenke replied: "Not to me they weren't you know." (Id. at 217.)

C. Facts Relating to Claim That A Juror Was Biased and Committed Misconduct

In his questionnaire, Schuenke stated that it would be hard for him to believe that petitioner was not involved in the offense. On voir dire, in response to the court's questions, he said that he meant by this that it would be hard for him to believe that petitioner was not there. In answer to one question from the prosecutor, he said that he would try to follow the court's instructions and decide the case on the evidence, and, in answer to another, that he would do so. In answer to petitioner's counsel's questions, he testified that he had an open mind about the charges and about defenses that petitioner might offer, and that he had not formed any opinions about any participants in the case. Petitioner did not exercise a peremptory strike to remove Schuenke, and Schuenke served on the jury.

The question of whether Schuenke was biased and committed misconduct was the subject of a post-conviction motion and hearing. Petitioner presented an affidavit and testimony from Jacqueline Mihm, a juror who had been excused. Mihm was a fifty-two-year-old college graduate, married and the mother of three, and a substitute teacher in the Wauwatosa School District for ten years.

Mihm testified that during all four days of jury selection, two or three men were making comments to other jurors that petitioner was guilty and that the trial was a waste of time. She stated that the men complained that too much money was being spent on the trial and that "the county could better spend it on something else," and that "this

[participating in the trial] was a waste of everybody's time." (App. at 625.) She testified that one of the men making the comments that petitioner was guilty and the trial was a waste stood out in her memory because of his "definitely not wanting to be on the jury" (id. at 626), and because he was "the man who spoke up to the judge" (id. at 602). She further testified, however, that "when the final tally was taken ... he didn't get his wish" and "was on the jury." (Id. at 626.) In this way, Mihm identified Schuenke as one of the men making the improper statements in the jury assembly room.

On cross-examination, the prosecutor asked Mihm about her answers to several questions on the jury questionnaire. In her questionnaire, Mihm disclosed that she had called the police regarding "domestic problems," but answered "no" to questions asking whether she had been involved in an assaultive relationship, experienced spousal abuse, been a victim of a crime involving physical violence, and had physical or emotional problems that might interfere with jury service. (Id.) At the hearing, she testified that, prior to receiving the questionnaire, she had been physically assaulted by her husband, that police had been called to her home to remove her son, and that she had had some emotional problems but did not believe they were sufficiently serious to prevent her from being a competent juror.

At the close of the hearing, petitioner moved for a new trial arguing that Schuenke's statements in the jury assembly room showed that he was biased and that he had not honestly answered the voir dire questions. The court rejected Mihm's testimony and denied the motion.

D. **Facts Relating to Claim That State Courts Arbitrarily Deprived Petitioner of Statutory Rights Relating to Jury Selection**

Petitioner claims that he was denied due process and the right to an impartial jury because the state courts arbitrarily deprived him of rights granted to him by state statutes in connection with jury selection. At the root of petitioner's claim is his assertion that the trial court unlawfully refused to remove three jurors, Jan Goldberg, Marcia Weidler and Edward Tonn, for cause. When the trial court refused to remove these jurors, petitioner used three of his statutory allotment of seven peremptory strikes to remove them. He contends that as a result of losing these strikes, he suffered substantial harm and that, therefore, the state court of appeals was required to grant him a new trial. The voir dire testimony of Goldberg, Weidler and Tonn is relevant to this claim. However, because I quote from this testimony at length later in the decision, I will not reproduce it here.

II. STANDARDS OF REVIEW

A federal court may grant federal habeas relief to a state prisoner who is in custody "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § § 2241(c)(3) and 2254(a). Because the habeas petition in this case was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the standard of review contained in that Act governs petitioner's claims. Ouska v. Cahill- Masching, 246 F.3d 1036, 1044 (7th Cir. 2001). As amended by AEDPA, the federal habeas statute allows federal courts to grant habeas relief if the state court decision under review (1) was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1); or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2).

However, the standards provided in § 2254(d)(1) and (2) only apply to a "claim that was adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d); accord Braun v. Powell, 227 F.3d 908, 916 (7th Cir. 2000). As courts have recognized, a state court decision cannot be viewed as an " 'adjudication on the merits' " if the state court failed to resolve all determinative issues of federal law, either because they were not before the state court or because the state court's framing or analysis of the claim omitted one or more dimensions of the requisite federal constitutional analysis. Randy Hertz & James Liebman, Federal Habeas Corpus Practice and Procedure § 32.2 (4th ed. 2001) (quoting 28 U.S.C. § 2254); see, e.g., Norde v. Keane, 294 F.3d 401, 410 (2d Cir. 2002) (because state court "never indicated in any way that it had considered [petitioner's] Sixth Amendment claims," the "claims were not adjudicated on the merits, and therefore ... AEDPA's new, more deferential standard of review does not apply"); Everett v. Beard, 290 F.3d 500, 507-08 (3d Cir. 2002) (holding that § 2254(d)(1) did not apply because state courts had analyzed claim solely under state law and did not address underlying due process issue: "[t]he AEDPA standard of review does not apply unless it is clear from the face of the state court decision that the merits of petitioner's constitutional claims were examined in light of federal law as established by the Supreme Court of the United States"); Lockhart v. Johnson, 104 F.3d 54, 57-58 (5th Cir. 1997) ("AEDPA's provision altering our standard of review, when the petitioner's claim has been adjudicated on the merits by a state court, has no application to this claim" because it "was not presented to the state court and the Director has waived the exhaustion requirement").

Where a claim has not been adjudicated on the merits by the state court, federal courts reviewing habeas petitions

must apply the general standard as set forth in 28 U.S.C. § 2243. Braun, 227 F.3d at 917. This standard requires courts to "dispose of the matter as law and justice require." 28 U.S.C. § 2243.

Section 2254(d)(2)'s provision authorizing habeas corpus relief when the state court's determination of the facts "is unreasonable ... in light of the evidence presented in the state court proceeding" appears to be contradicted by § 2254(e)(1)'s attachment of a strong presumption of correctness to apparently any "determination of a factual issue made by a State court."

> The two provisions must be read in pari materia, however. Doing so leads to the conclusion that § 2254(d)(2) divides "determination[s] of the facts" into two categories--state court factfindings that are flawed because they are "unreasonable," hence are a basis for habeas corpus relief without more; and findings that are not flawed because they are "[ ]reasonable," hence are presumed to be correct unless the petitioner proves otherwise "by clear and convincing evidence." In other words, the "determination[s] of a factual issue made by a state court" that § 2254(e)(1) tells courts to "presume[ ] to be correct" are only those determinations that survive § 2254(d)(2)'s winnowing out of "unreasonable determination[s]."

Hertz & Liebman, supra, § 20.2(c) (alteration in original) (quoting 28 U.S.C. § 2254); see, e.g., Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002) (because "several of the [state court] referees factual findings are clearly erroneous, state

court's decision must be deemed 'unreasonable determination of the facts' " under § 2254(d)(2)); Davis v. Strack, 270 F.3d 111, 133 (2d Cir. 2001) ("case ... fits comfortably under subsection (2) of § 2254(d)" because state courts' "determination of facts" regarding adequacy of evidentiary basis for self-defense instructions were "without reasonable basis"); Green v. White, 232 F.3d 671, 672, 678 (9th Cir. 2000) (state courts' findings that venireperson "did not lie about his past criminal history" and was "not biased" were "clearly erroneous" "factual determinations" and therefore state courts' decisions were based upon "unreasonable determinations of the facts").

III. DISCUSSION

A. Claim That Petitioner Was Denied Due Process and Right to an Impartial Jury When Trial Court Failed to Adequately Inquire into Questions Concerning Juror Bias That Arose During Jury Selection

Petitioner claims that he was denied due process and the right to an impartial jury because the trial court failed to adequately inquire into questions concerning juror bias that arose during jury selection. The state court of appeals addressed the adequacy of the voir dire under state law but did not address the federal due process questions raised by the court's handling of the jury selection process. Theodore Oswald, 232 Wis. 2d at 85-86. Respondent's view is that "[t]he Wisconsin Court of Appeals did not read Oswald's state appeal to raise a Groppi v. Wisconsin type claim" (Resp't's Br. at 10), i.e., a claim "that he was unconstitutionally deprived of the opportunity to take reasonable steps designed to insure that the jury was impartial, Groppi v. Wisconsin, 400 U.S. 505 (1971)" (Resp't's Br. at 4). However, respondent "does not oppose

this court addressing Oswald's claim that the trial court failed to fully investigate his bias/misconduct on the merits." (Id. at 10-11.)

Thus, I turn to the merits of petitioner's claim. However, as previously discussed, because the state court of appeals did not address the due process issue, it did not adjudicate petitioner's federal due process claim "on the merits" under § 2254(d). Therefore, I do not employ the standard of review provided in § 2254(d)(1), but rely on the general standard as set forth in 28 U.S.C. § 2243. Braun, 227 F.3d at 917 (citing Moore v. Parke, 148 F.3d 705, 708 (7th Cir. 1998)). I note, however, that I would reach the same result under either standard.

1. Applicable Law

The United States Constitution guarantees a criminal defendant the right to an impartial jury. U.S. Const. amend. VI. The Fourteenth Amendment guarantees a right to a jury trial in all state criminal cases which, if tried in a federal court, would come within the Sixth Amendment's guarantee of trial by jury. Duncan v. Louisiana., 391 U.S. 145, 149 (1968). Prior to Duncan, the Supreme Court recognized in Irvin v. Dowd, 366 U.S. 717 (1961), and in Turner v. Louisiana, 379 U.S. 466 (1965), that the Fourteenth Amendment's Due Process Clause independently requires the impartiality of any jury empaneled to try a case. Morgan v. Illinois, 504 U.S. 719, 726 (1992).

> In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. In re Oliver, 333 U.S. 257 (1948); Tumey v.

> Ohio, 273 U.S. 510 [(1927]). "A fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136 (1955). In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as "indifferent as he stands unsworn." Co. Litt., 155b. His verdict must be based upon the evidence developed at the trial. Cf. Thompson v. City of Louisville, 362 U.S. 199 (1960). This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 (1807). "The theory of the law is that a juror who has formed an opinion cannot be impartial." Reynolds v. United States, 98 U.S. 145, 155 (1879).

Id. at 726-27 (quoting Irwin, 366 U.S. at 721-22 (footnote omitted)) (internal quotation marks and parallel citations omitted).

In Turner, the Supreme Court relied on this passage to delineate "'the nature of the jury trial which the Fourteenth Amendment commands when trial by jury is what the State has purported to accord.'" Morgan, 504 U.S. at 727 (quoting Turner, 379 U.S. at 471). As reflected in the above passage, due process alone has long demanded that, if a jury is to be provided, regardless of whether the Sixth Amendment requires it, the jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment. Id. (citing Turner, 379 U.S. at 472 n. 10; cf. Groppi v. Wisconsin, 400 U.S. 505, 508-11 (1971).

Justice Holmes expressed the guarantee of impartiality almost a century ago in Patterson v. Colorado, 205 U.S. 454, 462 (1907): "[t]he theory of our system is that conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." Further, if any one member of a jury is not impartial and would be unable to render a fair verdict, then the jury cannot be considered impartial. Parker v. Gladden, 385 U.S. 363, 366, (1966). Finally, even if there is no showing of actual bias, due process is denied by circumstances that create the likelihood or the appearance of bias. Peters v. Kiff, 407 U.S. 493, 502 (1972).

The Supreme Court imposes a duty of vigilance on trial judges to ensure that defendants are tried by impartial juries. Due process requires that the "trial judge [be] ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." Smith v. Phillips, 455 U.S. 209, 217 (1982).

The Supreme Court has described the trial judge's duty to be vigilant in a number of ways. See Chandler v. Florida, 449 U.S. 560, 574 (1981) (stating that trial courts "must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law"); Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) (stating that courts must take such remedial measures as are necessary to prevent prejudicial outside interference at its inception); Remmer v. United States, 347 U.S. 227, 230 (1954) (indicating that when a trial court becomes aware of an occurrence that may have biased a juror, the court must "determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial"); Dennis v. United States, 339 U.S. 162, 168 (1950) (stating that when empaneling a jury, a trial court

must be zealous in protecting the rights of the accused); Mattox v. United States, 146 U.S. 140, 149-50 (1892) (holding that no ground of suspicion that the administration of justice has been interfered with may be tolerated; the jury may not be exposed to tampering by private communications and if they are so exposed, the court must determine if tampering really took place).

The most important way by which a trial court can ensure that jurors are impartial is to question them. Although trial courts have broad discretion concerning questioning jurors on voir dire, their duty to ensure an impartial jury requires that when there is some special reason to inquire into a particular subject, trial courts must permit that subject to be probed. See Mu'Min v. Virginia, 500 U.S. 415, 430-31 (1991) (stating that when jurors may have acquired knowledge of a case from an outside source they must be asked whether such information has caused them to form an opinion about the guilt or innocence of the accused); Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) (stating that voir dire plays critical function in ensuring Sixth Amendment right to impartial jury and must be adequate to identify biased jurors); Ristaino v. Ross, 424 U.S. 589, 596 (1976) (holding that where circumstances suggested need for voir dire to include questioning about racial prejudice such questioning must be permitted); Irvin, 366 U.S. at 723 (holding that challenging party must be given the chance to show that jurors have been prejudiced); Connors v. United States, 158 U.S. 408, 415 (1895) (stating that if any facts are brought to the attention of the court indicating that for some reason a juror might be biased (there, the juror's political affiliations) the court must permit inquiry into the matter).

A number of circuits have applied the above principles in different fact situations. In Dyer v. Calderon, 151 F.3d 970 (9th Cir. 1998) (en banc), a juror's candor

came into question after the jury found the defendant guilty of murder but before the start of the penalty phase. The court questioned the juror in chambers; but the questioning was extremely brief. The court of appeals reversed the district court's denial of habeas relief stating:

> A court confronted with a colorable claim of juror bias must undertake an investigation of the relevant facts and circumstances. An informal in camera hearing may be adequate for this purpose; due process requires only that all parties be represented and that the investigation be reasonably calculated to resolve the doubts.

Id. at 974.

Respondent argues that petitioner's reliance on Dyer is misplaced because it is not "'clearly established Federal law as determined by the Supreme Court.'" (Resp't's Br. at 8 (quoting § 2254(d)(1)).) However, as discussed, I review this claim under 28 U.S.C. § 2243. In any case, Dyer and the other circuit court decisions cited in this opinion do no more than apply the principles established by the Supreme Court.

In United States v. Lacey, 86 F.3d 956 (10th Cir. 1996), during voir dire, one potential juror remarked in the presence of other venirepersons that his opinion of the defendant's guilt would be affected if the defendant did not take the stand and proclaim his innocence. The remark appeared to have affected two other jurors who were questioned immediately after. The defendant then moved for a mistrial. However, the trial court instructed the venirepersons that the defendant did not have to take the stand and then questioned them to determine whether the statements to the contrary made by the other jurors would

prevent any of them from following the court's instruction. Thus, the court took steps to ensure that the defendant had not been prejudiced by the improper remarks. The court of appeals upheld the trial court's denial of the mistrial based in substantial part on the fact that the court "took the additional step of questioning the potential jurors in order to be certain that its instructions were heeded." Id. at 969.

And in United States v. Thomas, 463 F.2d 1061 (7th Cir. 1972), after a verdict was reached but before it was published, the trial court was made aware that during deliberations several jurors had copies of a newspaper article about the case and made arguments to other jurors based on the article. The defendant asked the trial court to inquire into the extent of the jurors' exposure to the article and the trial court denied the motion. The court of appeals reversed the conviction stating that when the court was presented with evidence that the article was present in the jury room and that jurors were using it to persuade others, the court "at the very minimum [was] required to investigate further." Id. at 1063; see also United States v. Boylan, 898 F.2d 230, 258 (1st Cir. 1990) (stating that trial court's "primary obligation is to fashion a responsible procedure for ascertaining whether misconduct actually occurred and, if so, whether it was prejudicial.").

2. Adequacy of Trial Court's Actions

Petitioner's claim is based on two separate but related occurrences. The first was when jurors Klitzka and Beers testified that other jurors had been talking about the case in the jury assembly room for four days and expressing the opinion that petitioner was guilty and the trial a waste of time. The second was when juror Schuenke stated in a letter to the court that he would probably be so concerned about his work that he could not give the trial the attention that it

deserved, and that he "might just vote either way just to end it." (App. at 322.)

With respect to the disclosures by Klitzka and Beers, petitioner asked the trial court to question Klitzka about the statements in more detail and/or to question the other jurors who had been qualified to serve on the jury to determine whether the statements had affected their ability to be impartial. With respect to Schuenke's communication, petitioner asked the trial court to question Schuenke to determine whether he could conscientiously serve as a juror. The trial court denied both requests. I conclude that in both instances the trial court violated its constitutional obligation to be vigilant to ensure an impartial jury.

a. Failure to Inquire Into Statements in Jury Assembly Room

Jurors Klitzka and Beers, while under oath, put the trial court on notice that for four days jurors had been talking about the case in the jury assembly room, contrary to the court's instructions. Klitzka stated that he

> had learned more in the last three days here sitting down in that room about this case than I have since the day that it happened ... according to what I hear the young man is guilty of what he is being accused of .... and [the trial is] a waste of time.

(Id. at 507-09.) Beers said that prospective jurors were saying, "it's guilty, you know, right off the top of their head" and had been doing so "all during the four days." (Id. at 412-13.)

The trial court was also on notice that the improper communications had caused some jurors to form the opinion that petitioner was guilty. Klitzka testified that, before he went to the jury assembly room he knew little about the case, but, after hearing about it from other jurors, he concluded that petitioner was guilty and that the trial would be a waste of time. Juror George Schroeder said on voir dire that he could decide the case based on the evidence but, after spending additional time in the jury assembly room, advised the court in a letter that he had formed the opinion that petitioner was guilty. It is not unreasonable to infer that the change in his opinion was caused by statements from other jurors.

The trial court was also on notice that Klitzka was very sensitive about disclosing any details about what was said in the jury assembly room. When petitioner's counsel asked him for such information, Klitzka responded: "No, I won't tell you that." (Id. at 519.)

Finally, the record makes clear that both the prosecutor and the trial court regarded the testimony of Klitzka and Beers as credible and were aware that the statements in the jury assembly room might have prejudiced petitioner. Surprisingly, the prosecutor initially suggested that it was reasonable for jurors to make such statements because they were "disgusted ... with the process." (Id. at 532.) It is unclear why the prosecutor thought that jurors were or had a right to be disgusted with the process. But, if they were disgusted, petitioner had reason to be concerned that their disgust was directed at him. After Beers corroborated Klitzka's revelation, the prosecutor expressed alarm and urged the court "to act immediately." (Id. at 417.) The prosecutor made clear that petitioner might have already been prejudiced by the communications, stating that "maybe we failed to [make clear to jurors that they were not to talk

about the case]" and expressing hope that "there's been no harm done." (Id.) The trial court also recognized the potentially prejudicial nature of the communications because it permitted petitioner's counsel to inquire about them of the few jurors who had not undergone voir dire, and because it went to the jury assembly room over the noon recess to re-instruct jurors not to talk about the case.

Yet, despite all this, the trial court refused to question or to permit petitioner's counsel to question either Klitzka or the approximately twenty- five jurors who had been qualified to serve on the jury about the impact of the statements. The trial court turned a blind eye to the question raised both by petitioner and by the prosecutor as to whether there had been "harm done." (Id.) There was unrefuted, credible evidence that the final pool of jurors included jurors who had made or possibly been influenced by the statements; yet the trial court refused to permit petitioner's counsel to find out if this was so.

With respect to Klitzka, the court appeared to embrace the prosecutor's surprising argument that asking him for further details about the statements would invade his "privacy," and that the matter was "none of [petitioner's counsel's] business." (Id. at 523-25.) With respect to the twenty-five jurors who had been qualified, the court stated that "the record is not there to justify making the inquiry." (Id. at 534.) Under the cases cited above, this statement was clearly wrong. The court knew that jurors had been making improper communications in the jury assembly room for four days and knew that the statements had prejudiced some jurors. Under the law, the court was required to "ascertain[ ] whether misconduct actually occurred and, if so, whether it was prejudicial." Boylan, 898 F.2d at 258.

Due process required the court to make an inquiry reasonably calculated to resolve the doubts that the testimony of Klitzka and Beers had created. Dyer, 151 F.3d at 974. In order to satisfy this duty, the court had a number of options available to it. The court could have commenced its inquiry by questioning Klitzka further, as petitioner repeatedly urged. Because of Klitzka's hostility to being questioned by petitioner's counsel, the court could have questioned Klitzka itself and, because he was "sensitive," could have done so in camera. Questioning Klitzka might well have provided the court and the parties with an understanding of the scope of the problem.

A second option would have been to collectively ask the jurors who had undergone voir dire whether they had made or been exposed to the improper communications. The court could have done this when it went to the jury assembly room to re-instruct jurors not to discuss the case. If the court had asked this question, it would have discovered how many jurors had been exposed to the improper communications. With this knowledge, the court could have determined what further steps, if any, were required. Possibly the court would have been required to individually question those jurors who had been exposed to the statements to determine whether they had been prejudiced. Possibly no jurors had been prejudiced. On the other hand, the inquiry might have turned up more jurors like George Schroeder who initially said that he could be impartial but after a few days in the jury assembly room, changed his mind.

A third option would have been for the court to question or permit counsel to question the jurors who had undergone voir dire individually to determine whether they had been exposed to and influenced by the statements. This is what the court did with respect to the jurors who had not undergone voir dire.

However, the trial court did none of these things. It made no effort to ascertain whether any of the approximately twenty-five qualified jurors who had undergone voir dire had been prejudiced as a result of the statements. Thus, it did not make an inquiry that was reasonably calculated to determine whether the statements had caused jurors to be prejudiced.

The court made no effort to discover either who had made the statements or what effect they had on other jurors. By failing to make this inquiry, the court violated its duty to be "ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." See Smith, 455 U.S. at 217. A potentially prejudicial occurrence took place, yet the court failed to determine its effect. Due process required that the court find out which, if any, jurors had been exposed to the improper statements and whether such exposure had caused them to form a fixed opinion about petitioner's guilt. See Mu'Min, 500 U.S. at 431. The requirements of due process prohibited the court from ignoring the potential harm to which it had been alerted. See Remmer, 347 U.S. at 230.

The trial court offered no rationale for permitting petitioner's counsel to question jurors who had not undergone voir dire about the statements but not jurors who had undergone voir dire. The record suggests that the prosecutor and the trial court were concerned that further inquiry might result in the loss of jurors. Both used the phrase "Pandora's box" to describe their concern. (App. at 323, 325.) Nevertheless, once the court was put on notice of the improper statements, it was obliged to determine whether the statements caused jurors to become prejudiced. The fact that, because of the notoriety of the case, it was hard to find impartial jurors did not exempt the court from its obligation to "be zealous to protect the rights of an accused." Dennis,

339 U.S. at 168. If anything, the court should have been particularly cautious. See Murphy v. Florida, 421 U.S. 794, 803 (1975) (stating that where there is widespread hostility to a defendant, the reliability of jurors' declarations of impartiality is subject to doubt).

The state court of appeals stated that, because of his coercion defense, petitioner wanted jurors who had knowledge about his relationship with his father. However, nothing in the record indicates that petitioner wanted jurors who made or were influenced by statements by other jurors that he was guilty and the trial a waste of time. No matter how strong the evidence is against a defendant or what the defense is, the Sixth Amendment and the Due Process Clause require that the jury be impartial. Irvin, 366 U.S. at 721-22.

b. Failure to Inquire of Schuenke

As previously indicated, after he had been questioned on voir dire but before the jury had been selected, juror Schuenke wrote to the court stating that he would probably be so concerned about his work that he could not give the trial the attention it deserved, and that he "might just vote either way just to end it." (App. at 322.) When the court did not excuse him, Schuenke made a disrespectful statement to the court saying, "I asked to speak to you two days ago. You mean I can't have five minutes of your time?." And when the court said that it had addressed his concerns, he made a second disrespectful statement: "Not to me they weren't you know." (Answer Ex. B2 at 216-17.)

When apprised of Schuenke's letter, petitioner requested that Schuenke be removed for cause or, at a minimum, be questioned to determine whether he could perform the duties of a juror. Petitioner's counsel stated:

> [A] juror that's basically saying they can't take their responsibility seriously. I mean if ... they can't fulfill their duty despite the instructions and ... they're not going to vote their conscience and listen to the evidence and deliberate according to law, obviously ... some further inquiry or record [is required].

(App. at 322) The prosecutor also recognized that Schuenke's letter raised a serious question as to whether Schuenke could satisfy the obligations of a juror and stated that he would leave the matter "up to the court." (Id. at 324.) However, the trial court not only refused to remove Schuenke, it also refused to question him about whether he would decide the case on the evidence or "vote just to end it." (Id. at 322.).

As stated, a trial court has a duty to be vigilant to ensure that a defendant will be tried by twelve jurors willing to follow the court's instructions. See Morgan, 504 U.S. at 730 (stating that part of the guarantee of a defendant's right to an impartial jury is to be able to question jurors sufficiently to identify those who are unqualified); Rosales-Lopez, 451 U.S. at 188 (stating that without adequately questioning jurors, "the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled"); see also Irvin, 366 U.S. at 722-23 (holding that a defendant must be afforded the opportunity to determine whether a juror is capable of deciding the case fairly).

The Seventh Circuit is particularly zealous about protecting the right to a probing voir dire. Fietzer v. Ford Motor Co., 622 F.2d 281, 284 (7th Cir. 1980). Trial courts may not "block the reasonable exploration of germane

factors that might expose a basis for challenge whether for cause or peremptory." United States v. Lewin, 467 F.2d 1132, 1138 (7th Cir. 1972). Further, when an issue arises concerning a juror's ability to decide the case on the evidence, it raises a judicial duty "'to do what [is] reasonably practicable to ... prevent unfairness in the trial.'" United States v. Dellinger, 472 F.2d 340, 370 (7th Cir. 1972) (quoting Bailey v. United States, 53 F.2d 982, 984 (5th Cir. 1931)).

Schuenke's letter put the court on notice that he might not follow the court's instructions to decide the case on the evidence. The letter was a threat that he would not be an impartial juror. This should have been a giant red flag for the court. Instead, the court ignored it. The content of the letter imposed a duty on the court to question Schuenke further. The court was obligated to determine whether Schuenke's desire not to serve on the jury would " 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " Wainwright v. Witt, 469 U.S. 412, 433 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)). Due process prohibits a trial court from allowing a venireman who has threatened not to decide the case based on the evidence to serve on a jury without at least inquiring into whether the threat is a sincere one.

c. Conclusion

Because it failed to adequately inquire into the statements that Klitzka and Beers reported were made in the jury assembly room and into whether Schuenke could fairly decide the case, the trial court breached its duty to ensure petitioner an impartial jury.

In both instances, the court was obliged to make an inquiry when the problem arose. Neither the impact of the statements nor Schuenke's willingness to decide the case on the evidence could have been addressed in a post- conviction proceeding because a juror cannot testify about "the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent or dissent from the verdict." Wis. Stat. § 906.06(2); see also Tanner v. United States, 483 U.S. 107, 127 (1987) (stating that jury deliberations are protected from intrusive inquiry). The time to inquire into whether jurors' opinions and attitudes would prevent them from serving as jurors is when the court is in a position to do something about it. See Sheppard, 384 U.S. at 363 (stating that courts must take such remedial measures as are necessary to prevent prejudicial outside interference at its inception); see also Rushen v. Spain, 464 U.S. 114, 128 n. 6 (1983) (Stevens, J., concurring) (stating that meaningful time for hearing is when doubts about impartiality can be remedied by replacing juror).

In conclusion, the trial court breached its duty to be vigilant to ensure that petitioner was tried by an impartial jury and, therefore, denied petitioner due process of law and the right to an impartial jury. Therefore, petitioner's application for the writ of habeas corpus must be granted.

B. **Claim That Petitioner Was Denied Due Process and Right to an Impartial Jury Because Biased Juror Served on Jury**

Petitioner also claims that he was denied due process and the right to an impartial jury because Schuenke, who served on the jury, was biased and committed misconduct. Petitioner claims that the evidence supports the conclusion that Schuenke was one of the jurors who made the improper statements in the jury assembly room, and that such

statements indicate that Schuenke was biased. Petitioner also claims that by not disclosing on voir dire the opinions he expressed in the jury assembly room, Schuenke committed misconduct.

With respect to this claim, the state court of appeals denied relief because it determined as a factual matter that Schuenke was not biased and did not commit misconduct. Theodore Oswald, 232 Wis.2d at 87. I, therefore, review the state court decision under 28 U.S.C. § 2254(d)(2) and ask whether the determination on which it rested was "unreasonable ... in light of the evidence presented." 28 U.S.C. § 2254(d)(2); see Herz & Liebman, supra, § 20.2(c).

As previously indicated, a defendant has a constitutional right to an impartial jury. Morgan, 504 U.S. at 726-27. If even one juror is biased, the jury cannot be considered impartial. Parker, 385 U.S. at 366. A biased juror is one who holds an opinion as to the defendant's guilt that he cannot set aside. Patton v. Yount, 467 U.S. 1025, 1036 (1984). Further, a new trial is required if a defendant "demonstrate[s] that a juror failed to answer honestly a material question on voir dire, and then further show[s] that a correct response would have provided a valid basis for a challenge for cause." McDonough Power Equip. Inc., Inc. v. Greenwood, 464 U.S. 548, 556 (1984). The question of whether a juror was biased and/or committed misconduct is one of historical fact. Patton, 467 U.S. at 1036. I owe deference to state court determinations of factual issues; but even in the context of federal habeas corpus, "deference does not imply abandonment or abdication of judicial review." Miller-El v. Cockrell, 123 S.Ct. 1029 (2003). A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude that the decision was unreasonable. Id.

The question of whether Schuenke was biased and/or committed misconduct was addressed at a post-conviction hearing. See Tanner, 483 U.S. at 127 (stating that after a trial a party may seek to impeach a verdict by non-juror evidence of misconduct). Petitioner presented the testimony of Jacqueline Mihm, one of the twenty-nine jurors in the final pool. Mihm was in the jury assembly room during all four days of jury selection.

Mihm testified that in the jury assembly room she heard "three men ... state [ ] that the defendant was guilty and the trial ... a waste of time." (App. at 601.) She testified that these men said that they had "no doubt about his guilt," and "stated these opinions in conversations in groups with other jurors." (Id. at 601-02.) She also testified that jurors made comments "about the trial being a joke or a sham ... [and] a waste of money because ... defendant was guilty." (Id. at 602.) She testified that one of the men making the comments "that the Oswalds were guilty and ... that the trial was a waste of time" made these comments on all four days of jury selection and that he stood out in her memory because he was "actively trying to get off the jury." (Id. at 626-27.) She also remembered him because he was "the man who spoke up to the judge" (id. at 602), and because "he didn't get his wish" to be excused from the jury (id. at 626).

The trial court rejected Mihm's testimony and denied petitioner's motion for a new trial. The state court of appeals affirmed the denial of the motion but not on the ground that Mihm was untruthful. Rather, it assumed that Schuenke made the statements testified to by Mihm but found that the statements did not evidence bias or prove misconduct.

I conclude that the state courts' decisions were both based on "unreasonable determination[s] of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(2). The

evidence establishes that Schuenke made the improper statements and that he was biased and committed misconduct.

Addressing the trial court's decision first, I note that in rejecting Mihm's testimony the court did not rely even in part on demeanor evidence. Thus, the principal reason for deferring to a trial court's credibility determination, that it has observed the witness's demeanor, is not present in this case. See Miller-El, 123 S. Ct. at 1040 (explaining that reason for deference to trial court credibility determinations is because trial court is in a position to assess demeanor).

The trial court gave several reasons for rejecting Mihm's testimony. The first was that she did not speak up to the bailiff or the court about the improper statements in the jury assembly room when they occurred. However, no other juror did either. That Mihm was not a whistle-blower is not a persuasive reason for rejecting her testimony. The court also stated that petitioner did not call other witnesses to corroborate Mihm. However, there were a limited number of potential witnesses to Schuenke's conduct, and testifying in support of petitioner was hardly an attractive prospect. Thus, petitioner's failure to produce other witnesses is not a good reason for negating Mihm's testimony.

The main reason that the court gave for rejecting Mihm's testimony was her answers to several questions on the juror questionnaire. Mihm had contacted police about physical threats by her husband; thus, she should have answered "yes" instead of "no" to questions asking whether she had been a victim of spousal abuse or crimes of violence. In response to another question on the questionnaire, however, she acknowledged that she had contacted the police because of domestic problems. Further, she was candid about these problems during voir dire; and the court and counsel

appeared to be satisfied with her answers and with her because neither party asked that she be excused.

The trial court also stated that Mihm should have mentioned her emotional problems and medications in response to an inquiry in the questionnaire asking "whether she had health problems or disabilities, either physical or emotional that would affect service for jury duty? " (App. at 609 (emphasis added).) However, Mihm properly answered "no" to the question because she did not believe that she had a condition that affected her ability to serve as a juror, and there is no evidence in the record suggesting that she had such a condition.

Thus, the trial court strained to reject Mihm's testimony. Because she gave inaccurate or incomplete answers to several sensitive questions, the court treated her testimony about what occurred in the jury room as unreliable. (Answer to Pet. Ex. B 10 at 28.)

This determination was unreasonable, primarily, because all or nearly all of Mihm's testimony was corroborated by other evidence. Her testimony that jurors were saying that petitioner was guilty and the trial a waste of time was corroborated by Klitzka and Beers. The only information that she added was that one of the jurors making the statements was Schuenke. And, to a considerable extent, this testimony was corroborated by Schuenke's own behavior. Schuenke's willingness to engage in conduct disrespectful of the court, including threatening not to decide the case on the merits and verbally challenging the judge, suggests that he would have had little compunction about violating the court's order not to make statements about the case to other jurors. His other disrespectful conduct appears to have been of a piece with telling fellow veniremen that petitioner was guilty and the trial a waste of time.

The manner in which Mihm identified Schuenke also strongly suggests that her testimony was truthful. She testified that she remembered one of the men who made the improper statements because of his "definitely not wanting to be on the jury" (App. at 626), and because he was "the man who spoke up to the judge" (id. at 602). She also described him as the man who asked "why ... the judge had not responded to a letter that he had written about ... not wanting to serve on the jury," and said that "when the final tally was taken ... he didn't get his wish" and "was on the jury." (Id. at 626-27.) All of her descriptions of the man who made the statements clearly point to Schuenke; and it seems highly unlikely that they were concocted. Finally, nothing in the record suggests that Mihm had a motive to testify falsely or that emotional problems caused her to do so. Thus, the record, fairly assessed, does not support the trial court's rejection of Mihm's testimony.

The state court of appeals approached the question of whether Schuenke was biased differently than the trial court. It assumed that Mihm testified truthfully but found that Schuenke's statements did not indicate bias or misconduct. This determination was even more strained than the trial court's, and it too was unreasonable.

Schuenke was biased because his statements in the jury assembly room show that he held a fixed opinion that petitioner was guilty and had not set aside his opinion. A juror who holds the opinion that a defendant is guilty and a trial a waste of time is biased. See Patton, 467 U.S. at 1036. Schuenke's statements demonstrate not only that he thought that petitioner was guilty, but that his opinion was so fixed that he considered it unnecessary even to hold a trial. Another indication of how fixed Schuenke's opinion was was that he could not resist repeating it for four days in

violation of the court's order. Additionally, Schuenke expressed this opinion after he had been questioned on voir dire, thereby demonstrating that he could not set aside his view that petitioner was guilty even after being made aware that he was required to do so. Thus, Schuenke's statements in the jury assembly room demonstrate that he had a fixed opinion that petitioner was guilty, and that he had not set such opinion aside. Therefore, he was not an impartial juror.

The court of appeals's determination that his statements were compatible with being open to petitioner's coercion defense was also manifestly unreasonable. A juror who believes that a defendant's guilt is so firmly established that it is unnecessary to hold a trial cannot reasonably be said to be open to any defense.

Schuenke's statements in the jury assembly room were also inconsistent with his answers on voir dire. On voir dire, the prosecutor asked Schuenke whether he could "decide this case based solely on the evidence," to which Schuenke replied, "sure." (App. at 307-08.) Petitioner's counsel asked him if he would have an open mind concerning the charges, and Schuenke said "yeah." (Id. at 308-09.) Petitioner's counsel then asked if he had an open mind about any possible defenses, and Schuenke said "yeah." (Id. at 309.) Petitioner's counsel then asked Schuenke if he had formed an opinion about petitioner, and Schuenke responded "no." (Id.) Finally, petitioner's counsel asked Schuenke if he had expressed any opinions about the case, and Schuenke replied, revealingly, that he might have said something like "what a waste," but that after he got the jury packet he tried to "keep ... pretty much out of it." (Id. at 310.)

Thus, on voir dire Schuenke indicated that he would be impartial, and at that time both parties accepted him as a

juror. His statements in the jury assembly room showed that his answers on voir dire were untruthful. Moreover, his answers related to a material question, whether petitioner was guilty. A truthful answer would have provided a valid basis for his removal. See McDonough Power Equip., 464 U.S. at 556 (stating that juror who fails to provide honest answer commits misconduct if honest answer would have created valid challenge for cause). Schuenke did not say on voir dire that he thought that petitioner was guilty and the trial a waste of time. If he had, he would have been removed as a juror. When he told the court and counsel on voir dire that he had an open mind and would decide the case on the evidence, and then turned around and, out of their presence, told other jurors that petitioner was guilty and the trial a waste of time, Schuenke expressed opinions about the case that were inconsistent and irreconcilable. Thus, the court of appeals's determination that petitioner did not misrepresent his opinion on voir dire and, therefore, did not commit misconduct was also an unreasonable determination of the facts in light of the evidence.

For the reasons stated, the court of appeals's decision denying petitioner relief was based on its unreasonable factual determination that Schuenke was not biased and did not commit misconduct. Schuenke was biased and committed misconduct and he served on the jury that convicted petitioner. If one member of a jury is not impartial, then the jury cannot be considered impartial. Parker, 385 U.S. at 366. Therefore, petitioner was denied his right to an impartial jury and to due process as well. Thus, on this claim, the writ of habeas corpus must issue pursuant to § 2254(d)(2).

C. **Claim that Rights to Due Process and Impartial Jury Were Denied Because State Courts**

Arbitrarily Deprived Petitioner of Statutory Rights Relating to Jury Selection

Petitioner claims that he was denied due process and an impartial jury because the state courts arbitrarily deprived him of state statutory rights relating to jury selection. He contends that he was substantially harmed when the trial court erred in failing to remove three jurors for cause and the court of appeals erred in not granting him a new trial on the ground that he was forced to use peremptory strikes to remove the biased jurors. The state court of appeals denied petitioner relief based on its factual determination that the jurors in question were not biased. I, therefore, review the court's decision under 28 U.S.C. § 2254(d)(2).

1. Applicable Law

A federal court may not issue a writ of habeas corpus on the basis of a perceived error of state law. E.g., Pulley v. Harris, 465 U.S. 37, 41 (1984). The Due Process Clause, however, also requires that states not act arbitrarily or irrationally, Honda Motor Co. v. Oberg, 512 U.S. 415, 434 (1994) (stating that the Due Process Clause's "whole purpose is to prevent" arbitrary deprivation of liberty or property), or deny fundamental fairness, Bearden v. Georgia, 461 U.S. 660, 673 (1983) (stating that "fundamental fairness [is] required by the Fourteenth Amendment").

When a state grants criminal defendants certain statutory rights, it may create "a substantial and legitimate expectation" on their part that they will not be deprived of their liberty in violation of such rights. Hicks v. Oklahoma, 447 U.S. 343, 346 (1980). And, if the state arbitrarily disregards the rights it has created, it may be found to have violated due process of law. Id. In Hicks, a jury sentenced the defendant to a mandatory forty-year prison term under a

provision of the Oklahoma habitual offender statute. After Hicks's conviction, the state court of appeals found the statute unconstitutional. When Hicks attempted to have his sentence set aside, the state court of appeals held that, despite the unconstitutionality of the statute, Hicks's sentence fell within the permissible range of punishment for his conviction and refused to order resentencing. The Supreme Court vacated the sentence because the state had provided a statutory right to have criminal sentences imposed at the discretion of a jury. The defendant's entitlement to jury sentencing constituted a "liberty" interest protected by the Fourteenth Amendment. Id. The Court viewed Oklahoma's denial of Hicks's state law entitlement to be sentenced by a jury as an "arbitrary disregard of the petitioner's right to liberty." Id. Finding a due process violation, the Court rejected the state's argument that "all that is involved in this case is the denial of a procedural right of exclusively state concern." Id. at 346-47. See also Logan v. Zimmerman Brush Co., 455 U.S. 422, 433-34 (1982) (holding that a state procedure foreclosing litigants from presenting certain claims denied due process because it denied a state created entitlement in a "random" manner).

In Ross v. Oklahoma, 487 U.S. 81 (1988), the Supreme Court discussed the application of the principle stated in Hicks in the context of jury selection. In Ross, the petitioner argued that his right to due process was abridged because he was arbitrarily deprived of the full complement of nine peremptory challenges allowed under Oklahoma law. The court rejected petitioner's claim based on its conclusion that he had received "all that was due [him] under Oklahoma law." Id. at 91. The court's analysis of the petitioner's due process claim rested upon the fundamental precept that "peremptory challenges are a creature of state law and are not required by the Constitution." Id. at 89. While acknowledging that "the right to exercise peremptory

challenges is 'one of the most important of the rights secured to the accused,' " the majority stated that it was "for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise." Id. (quoting Swain v. Alabama, 380 U.S. 202, 219 (1965), overruled on other grounds by Batson v. Kentucky, 476 U.S. 79 (1986)).

Thus, the question of whether the petitioner's right to due process was violated necessitated an inquiry into whether petitioner received all that he was entitled to under Oklahoma law. Id. The court then pointed out that Oklahoma law required counsel to remedy a trial court's error in denying a removal for cause by exercising a peremptory challenge. Thus, the petitioner had not been deprived of any of his rights under Oklahoma law and, therefore, his claim of a violation of his due process right lacked merit. Id. at 91.

Similarly, in United States v. Martinez-Salazar, 528 U.S. 304 (2000), a federal district court erred in refusing to remove a juror for cause, causing the defendant to use one of the ten peremptories allotted to him under Fed. R. Civ. P. 24(b) to remove the juror. Applying the Ross analysis, the Court reasoned that the defendant could have left the biased juror on the jury and challenged the trial court's decision on appeal but chose not to, and therefore received all that he was entitled to under Rule 24(b). Thus, he was not denied due process. Martinez- Salazar, 528 U.S. at 315-16.

Additionally, both Ross and Martinez-Salazar make clear that when a defendant's loss of peremptories due to a trial court's failure to remove biased jurors results in a biased juror sitting on the jury, the rights to due process and an impartial jury are denied. Martinez-Salazar, 528 U.S. at 316 (citing Ross, 487 U.S. at 85).

Thus, when a state court defendant argues that due process and the right to an impartial jury were denied because he was deprived of his right to peremptory strikes, the critical question, under Ross, is whether the defendant received all that he was entitled to under state law. In the present case, petitioner asserts that he got nothing of what he was entitled to under state law. He argues that he was deprived not only of the peremptory strikes to which state law entitled him, but also of his right to a new trial if he used peremptory strikes to correct trial court errors and was substantially harmed as a result.

2. Rights of Which Petitioner was Deprived

Wisconsin provides criminal defendants with certain protections in connection with jury selection. First, Wis. Stat. § 805.08(1) requires trial judges to remove jurors who are "not indifferent in the case." Thus, while defendants in all jurisdictions have a right to an impartial jury under the Sixth Amendment, Wisconsin defendants have a specific statutory entitlement to have trial courts remove biased jurors. Second, Wis. Stat. § 972.03 guarantees defendants a specific number of peremptory strikes (in petitioner's case, seven). Finally, in State v. Lindell, 245 Wis. 2d 689, 746-47 (2001), the Wisconsin Supreme Court held that if a defendant uses some of his statutorily provided peremptory strikes to correct trial court failures to remove biased jurors, and if the loss of such peremptories affects his substantial rights he is entitled to a new trial.[1]

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[1] Lindell overruled State v. Ramos, 211 Wis. 2d 12, 564 N.W.2d 328 (1997), which held that a defendant who used a peremptory to correct a trial court's failure to remove a biased juror was entitled to a new trial even without showing that he was harmed. Petitioner's trial was held before either Ramos or Lindell was decided; thus, it is unclear what rule was in effect at the time. However, in Lindell, the court pointed out that the Ramos court had failed to consider Wis. Stat. § 805.18(2),

In the present case, petitioner was deprived of all three of these rights. First, the trial court failed to remove jurors who were not indifferent. Second, petitioner used three of his peremptories to correct the trial court's errors. Third, notwithstanding that petitioner was harmed by losing his peremptories, the court of appeals failed to grant him a new trial.

a. Deprivation of Right to Have Trial Court Remove Biased Jurors

Petitioner argues that the trial court violated § 805.08(1) by failing to remove jurors Goldberg, Weidler and Tonn for bias. Respondent makes no attempt to argue that these jurors were impartial. However, even if respondent had contested the issue, I would find that none of the three were impartial.

The word "indifferent" in § 805.08(1) codifies the requirement of the Sixth Amendment and its state counterpart that jurors be impartial. State v. Faucher, 227 Wis. 2d 700 (1999). Under the Sixth Amendment, a juror's impartiality is determined by the following test: did the "juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed." Patton, 467 U.S. at 1036 (citation omitted). This standard is a federal constitutional one; however, the determination of whether a juror can in fact satisfy it is owed special deference by a habeas court. Id. at 1037 n. 12 (citations

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Wisconsin's harmless error statute. Thus, I will assume that the rule announced in Lindell was applicable at the time petitioner was tried, and that petitioner was entitled to a new trial based on having to use peremptories to correct trial errors in failing to remove biased jurors only if the resulting loss of peremptories actually caused him harm.

omitted). Nevertheless, "deference does not imply abandonment or abdication of judicial review." Miller-El, 123 S. Ct. at 1041. The question is whether the determinations by the state courts that jurors Goldberg, Weidler and Tonn were impartial were "reasonable" in light of the record evidence. See 28 U.S.C. § 2254(d)(2).

To be impartial, a juror must be able to "'lay aside his impression or opinion and render a verdict based on the evidence presented in court.'" Murphy, 421 U.S. at 800 (quoting Irvin, 366 U.S. at 723). In Murphy, the Court also said that even if a juror declared his impartiality, the atmosphere in a community could be considered in determining declarant's veracity:

> In a community where most veniremen will admit to a disqualifying prejudice, the reliability of the others' protestations may be drawn into question; for it is then more probable that they are part of a community deeply hostile to the accused, and more likely that they may unwittingly have been influenced by it.

Id. at 803.

Thus, Patton and Murphy require that in order to satisfy the federal constitutional standard of impartiality, a juror must unequivocally declare that he can set aside his opinion that a defendant is guilty and decide the case on the evidence. The Seventh Circuit has made clear that jurors who are unable to give unequivocal assurances that they can relinquish their prior beliefs for purposes of deciding the case must be removed for cause. Thompson v. Altheimer & Gray, 248 F.3d 621, 626 (7th Cir. 2001).

> When a prospective juror manifests a prior belief that is both material and contestable ... it is the judge's duty to determine whether the juror is capable of suspending that belief for the duration of the trial. When as in this case the record contains no assurances that the belief is "shakable," that the prospective juror can exercise a judgment unclouded by that belief, the verdict cannot stand.

Id. at 627. In Thompson, the juror in question said that "she would try to be fair, but she expressed no confidence in being able to succeed in the attempt." Id. at 626. The juror failed to give those "unequivocal assurances" that the law requires. Id. Therefore, the trial court's refusal to excuse her for cause was error. Id. at 626-27.

Decisions in other circuits are to the same effect. Jurors cannot be found to be impartial under the Sixth Amendment based on statements that fall short of assurances that they can lay aside biased opinions for the duration of the trial. On this point, the Sixth Circuit stated:

> In the absence of an affirmative and believable statement that these jurors could set aside their opinions and decide the case on the evidence and in accordance with the law, the failure to dismiss them was unreasonable. See Patton, 467 U.S. at 1036, 104 S.Ct. 2885.
>
> From the record before us, it appears that the trial judge based his findings of impartiality exclusively upon each juror's tentative statements that they would try to decide this case on the evidence presented at

> trial. Such statements, without more are insufficient....

Wolfe v. Brigano, 232 F.3d 499, 503 (6th Cir. 2000).

The Eighth Circuit held similarly in United States v. Sithithongtham, 192 F.3d 1119, 1121 (8th Cir. 1999). There, a prospective juror was questioned on voir dire as follows:

> Q: So you think you could be fair and impartial under the circumstances, or do you think it would be difficult for you?
>
> A: No, I'm sure I could probably be fair and impartial.

The court found that the district court erred in refusing to strike the juror for cause, stating: "[A] juror who 'would probably give [law enforcement officers] the benefit of the doubt,' is not what we would consider impartial. Nor is a juror who 'could probably be fair and impartial.' 'Probably' is not good enough." Id.

The Ninth Circuit observed that if prospective jurors cannot give unequivocal assurances that they will be impartial, there is no basis for the court and counsel to have confidence that the trial will be a fair one.

> A juror is considered to be impartial only if he can lay aside his opinion and render a verdict based on the evidence presented in court. Doubts regarding bias must be resolved against the juror. When a juror is unable to state that she will serve fairly and impartially despite being asked repeatedly for such assurances we can have no confidence that the

> juror will lay aside her biases or her personal experiences and render a fair and impartial verdict....

United States v. Gonzalez, 214 F.3d 1109, 1114 (9th Cir. 2000) (internal quotation marks and citations omitted).

Finally, the rule was eloquently stated by Chief Judge Kaye of the New York Court of Appeals in a recent criminal case:

> What we can – and do – ask, however, is that every juror enter the trial with an open mind, that every juror not be prejudiced from the outset against any particular party, and that every juror be willing to decide the case solely on the evidence presented and the law instructed by the Trial Judge.
>
> ... Upon a challenge, a juror who has revealed doubt, because of her prior knowledge or opinion, about her ability to serve impartially must be excused unless the juror states unequivocally on the record that she can be fair .... [J]urors must clearly express that any prior experiences or opinions that reveal the potential for bias will not prevent them from reaching an impartial verdict. If there is any doubt, the trial court should err on the side of excusing the juror.

People v. Arnold, 753 N.E.2d 846, 850-51 (N.Y. 2001) (internal citations omitted and emphasis added).

In its decision in the present case, the state court of appeals indicated that something less than a juror's

unequivocal statement that he could set aside his opinion and decide the case solely on the evidence was a sufficient basis on which to rest a finding of impartiality. Theodore Oswald, 232 Wis. 2d at 85-86. However, the rule that a juror may not be found to be impartial unless he can provide assurances that he is able to lay aside his opinion and render a verdict based solely on the evidence is a federal constitutional requirement, Patton, 467 U.S. at 1037 n. 12; and Wisconsin courts are not free to disregard or dilute it.

With the foregoing principles in mind, I turn to the question of whether the determinations by the state courts that jurors Goldberg, Weidler and Tonn would be impartial were unreasonable.

i. Goldberg

On voir dire, Goldberg was questioned first by the court. He said that his opinion was "that [petitioner was] guilty." (App. at 704.) The court then asked him whether he could decide the case based on the evidence, to which Goldberg replied, "that would probably be very difficult." (Id.) The court then asked him why it would be difficult and Goldberg responded: "I guess because this has gone on for so long. I've had time to think about it." (Id.) In response to another question, Goldberg added, "I guess my mind is pretty well set." (Id. at 705.) The court then asked Goldberg if his mind was set even though the information he may have heard might not be entirely accurate. Goldberg said: "That's correct." (Id.)

The prosecutor then asked Goldberg whether, if the evidence were different from what he read, he could decide the case based on what he heard in court. Goldberg said: "I would hope I'd have an open enough mind to be able to do that." (Id. at 707.) The prosecutor asked if Goldberg would

try, and Goldberg said, "I'd try." (Id.) The prosecutor then asked Goldberg if his mind was set because of what he had read and Goldberg responded: "That and the way I feel in my own personal morals." (Id. at 708.)

Then petitioner's counsel questioned Goldberg and asked if he felt pretty strongly that petitioner was guilty and Goldberg said: "That's correct." (Id. at 710.) Petitioner's counsel asked if it would take a lot to convince him that petitioner was not guilty and Goldberg replied: "Yes, it would." (Id. at 711.) Petitioner's counsel asked whether he felt strongly about that, and Goldberg said, "I do." (Id.) Petitioner's counsel asked if he would have a hard time presuming the defendant was innocent and Goldberg said, "I think I would." (Id. at 712.) Petitioner's counsel then asked whether he could keep an open mind during the trial, and Goldberg responded: "It probably would be very difficult." (Id.) In response to a question as to whether his belief would prevent him from keeping an open mind, Goldberg replied: "That's correct." (Id.) In response to additional questions, Goldberg said that he favored the prosecutor's side and that it would be very difficult for him to be impartial. Petitioner's counsel asked whether, if the judge told him to disregard his beliefs he could do so, and Goldberg said: "I honestly don't know." (Id. at 713.) He then said that he did not think that he should be a juror in the case because he felt so strongly that petitioner was guilty. Petitioner's counsel then asked if Goldberg expected him to prove that petitioner was not guilty to which petitioner replied, "Yes." (Id. at 714.) Goldberg then added: "I would like to see him get a fair trial but it would be difficult for me." (Id.)

The prosecutor then asked several follow-up questions. First, he said, "Mr. Goldberg, not to beat a dead horse, what I'm hearing you say is based on what you heard or read about the case you have a believe of feeling as to the

guilt or innocence of Theodore Oswald?" (Id. at 715.) To which Goldberg replied, "I have formed a very strong opinion, that is correct." (Id.) The prosecutor then asked him whether if he heard something different during the trial he could change his mind, and Goldberg replied: "I guess it would have to be a very strong point to change my mind at this point." (Id. at 715- 16.)

Petitioner then asked that Goldberg be removed for cause; and the court denied the motion. The state court of appeals affirmed the trial court's determination.

The state courts' findings that Goldberg was impartial were manifestly unreasonable. Goldberg said that he had a strong opinion that petitioner was guilty, and he never said that he could set that opinion aside and decide the case on the evidence. He said that he would try to be fair; but even this statement was made in the context of others indicating that it would be difficult for him to decide the case on the evidence, that his mind was pretty well set, that he felt strongly that petitioner was guilty, that he would have a hard time presuming petitioner was innocent or keeping an open mind during the trial, and that he did not know if he could disregard his beliefs.

Thus, the record contained no assurance that Goldberg's belief in petitioner's guilt was "shakable," and no indication that Goldberg had any confidence that he would be "able to succeed in the attempt" to be fair. See Thompson, 248 F.3d at 626-27. Goldberg did not come close to meeting the Sixth Amendment standard of impartiality as defined in Patton and Murphy. I emphasize here that that issue is not one of credibility. No one disputes that Goldberg was telling the truth. The issue is interpretive, see Thompson, 248 F.3d at 625: did Goldberg's statements manifest a degree of bias sufficient to make unreasonable the state courts' decisions

that he need not have been removed? There can be no doubt that the answer to that question is yes.

ii. Weidler

Weidler stated in her questionnaire and on voir dire that petitioner was guilty. In response to the court's questions, she said that she was home when the incident happened and she looked out her window and saw about eleven squad cars flying by. She felt that she "might not be able to be really fair to Mr. Oswald because of the fact that that created such a trauma and that you automatically think, well, you're not really safe even if you're in your own home." (App. at 804). In response to further questioning, she added: "You're not safe. You think you're safe, you have your doors locked but they come on through. It was a scary thought to me. It still is a scary thought to me." (Id. at 804-05.) The court then asked her whether she could decide the case on the evidence, and she said: "I would try. I'm not sure how that affects you. I don't know if you can totally block that out of your mind." (Id. at 806-07.)

The prosecutor then asked her whether she could set aside her opinion and Weidler answered: "I don't know. I think it's kind of hard to answer. I think I would try." (Id. at 808.) The prosecutor then asked her almost the identical question a second time and Weidler again replied: "I don't know. I guess, um, I feel like I would try. I feel, you know, still kind of traumatized over it because of the fact of the hostage situation. I guess but I think I would try. I realize that would be my job or my duty here." (Id. at 809.)

Petitioner's counsel then questioned Weidler about petitioner's defense of coercion, which had previously been explained, and she said that "there may be reasons we do things, but that doesn't excuse the behavior." (Id. at 811.)

She subsequently added, "I still really feel that you always have a choice .... I think we all know right from wrong." (Id. at 812.) Petitioner's counsel asked if she could consider the defense if the judge instructed her to do so. She said: "I think it's really hard at this time. I think you would try. I'm not sure that you could .... If I were instructed to do it, obviously I would try. I don't know if I could." (Id. at 813.) He then asked her if she could be an impartial juror, considering what she had read or seen in the media. Weidler responded:

> I guess I would try is the best answer I can give you .... I guess I'm more concerned from the trauma that I feel and the anger and I'm not sure I can be impartial on that aspect. I think I would try as far as the media thing if that's what you ask me.

(Id. at 814.) With respect to the trauma, she added: "It really makes me angry. It's taken away the feeling of safety within my own home." (Id.)

The court then questioned Weidler further and asked if she could follow its instructions that the law may excuse certain conduct from criminal liability if certain facts are proven. Weidler responded: "I guess I would try to follow your instructions. I guess I probably have a problem with that part of the law, umm, my conservative mind but I would try." (Id. at 817.) The judge then asked, even if she did not necessarily agree with the law, would she be willing to try to follow it; and Weidler said that she "would try to." (Id.)

Thus, like Goldberg, Weidler started with the opinion that petitioner was guilty and never said that she could lay aside her opinion and decide the case on the evidence. At most, she said that she would try to do so. However, she said that she would be unable to even try to set aside her feeling

that she was no longer safe: "I guess I'm more concerned from the trauma I feel and the anger and I'm not sure I can be impartial on that aspect. I think I would try as far as the media thing." (Id. at 814.) And even her statement that she would try to set aside her opinion that petitioner was guilty was hedged with qualifiers, such as her statements about her openness to coercion defense: "I think it's really hard at this time .... I don't know if I could .... [W]e all know right from wrong." (Id. at 812). Again, the issue is not one of credibility. Weidler was obviously sincere, but she too fell far short of satisfying the standard for being considered impartial. What was missing were the " 'unwavering affirmations of impartiality' " necessary to ensure that the defendant will receive a fair trial. Thompson, 248 F.3d at 627 (quoting United States v. Garcia, 936 F.2d 648, 653 (2d Cir. 1991)). The determinations of the state courts that she was impartial were manifestly unreasonable.

iii. Tonn

Tonn testified on voir dire that his opinion was that petitioner was guilty. The court questioned him first and asked if he could set his opinion aside, and Tonn said: "I honestly don't know." (App. at 905.) The court asked him whether he could set aside his opinion even if the evidence showed that the information on which it was based was inaccurate. Tonn said "ah, again, I don't know if I--if I could make that separation." (Id. at 906.)

The prosecutor then asked Tonn whether he could follow the court's instructions and decide the case on the evidence. Tonn said: "I don't think so." (Id. at 907.) The prosecutor asked Tonn why this was so, and Tonn mentioned that it was primarily the videotape that he had seen. The prosecutor then asked Tonn if he could decide the case based

on the evidence if the videotape were part of the evidence, and Tonn said "yeah." (Id. at 908.)

Petitioner's counsel then questioned Tonn and they engaged in the following colloquy:

> Q. And when you responded to Mr. Bucher that you would not be able to set aside your opinion, were you referring only to opinions based on what you saw on television or opinions that were the result of the print media as well?
>
> A. Both.
>
> Q. So even if the videotape was introduced as evidence in this case and you viewed it as a juror are you saying that you would have--you would not be able to set aside opinions that you've reached about this case from other media sources such [as] the press?
>
> A. I would say no.
>
> Q. No? You would not be able to set those aside?
>
> A. No.
>
> (Id. at 909.)

Petitioner's counsel then asked Tonn about his previous request to discuss something outside the presence of the other jurors, and Tonn said that serving on the jury "would be a hardship for the business that I run." (Id. at 910.) Petitioner's counsel asked whether that problem would

affect Tonn's ability to be impartial. Tonn replied: "It would cause great distress on a regular basis. I don't know how I would -- if that would affect the impartiality or not." (Id.)

The court then advised Tonn that if he were a juror he would be able to have some contact with his business and asked him if that would relieve some of his concerns, and Tonn said, "that would relieve some." (Id. at 911.) However, the court did not ask him if that would enable him to be an impartial juror.

The prosecutor then questioned Tonn again as follows:

Mr. Bucher: Yes. Just one question.

> Q. It's catching. Umm, if--so I understand that if you're instructed by the court that as you come into the jury room you aren't to wipe out your memory banks and forget what you heard but set aside any preconceived opinions that you have regarding guilt or innocence and decide the case only on the evidence and not what you read, and if part of the evidence is the video you'd be able to do that? That's what I thought I --
>
> A. Yeah.
>
> Q. -- heard you say.

(Id. at 912.)

After Tonn's voir dire, petitioner asked that he be removed for cause. The court noted that Tonn had given "divergen[t] or inconsistent answers," but denied petitioner's

request in part because petitioner's counsel permitted the prosecutor to ask the last question. (Id. at 917.) Petitioner's counsel objected to the court relying on such a ground stating that he had chosen not to ask more questions because he thought that it was "important not to badger these people," and "it was clear that [Tonn] was giving inconsistent answers." (Id. at 918.) See State v. Ferron, 219 Wis. 2d 481, 503 (1998) (cautioning courts that jurors being questioned on voir dire should not be badgered), overruled on other grounds by Lindell, 245 Wis. 2d 689.

With respect to the reasonableness of the state courts' determination that Tonn was impartial, although Tonn said a number of times either that he could not set his opinion aside, that he did not think he could set it aside or that he did not know if he could set it aside, he did answer "yeah" to the prosecutor's question at the end of voir dire. And the trial court deemed his answer to be credible. Therefore, whatever reservations I might have about that aspect of the state courts' determination, such reservations would probably be an insufficient basis for overturning the determination.

However, Tonn's voir dire suffers from a more serious deficiency. Tonn testified that he did not know if his distress about being away from his business would affect his ability to be impartial. After he said this, the court attempted to allay his concerns by telling him that he could have some contact with his business. The court then asked him if that would relieve some of his concerns, and Tonn said: "If I was able to have contact on a regular basis that would relieve some." (App. at 911.) However, the court never asked him if that would enable him to be impartial and never obtained any assurance from him that, notwithstanding his previous "I don't know," he would be able to be impartial.

In this respect, the case is similar to Thompson. The critical question, whether Tonn could be impartial despite his concerns about his business, was left dangling. In Thompson, the court said: "Had the judge pushed Leiter [the juror in question] and had she finally given unequivocal assurances that he deemed credible, his ruling could not be disturbed. But he failed to do that." 248 F.3d at 627. The same problem exists with Tonn. The court did not obtain the unequivocal assurance of impartiality that the law requires. Again, the issue is not one of credibility. Rather, the record does not reflect those "unwavering affirmations of impartiality" that permitted the court in Garcia, 936 F.2d at 653, to find the challenged juror impartial. See Thompson, 248 F.3d at 627. Thus, the state courts' determinations that Tonn was impartial were unreasonable.

b. Deprivation of Peremptory Strikes

Under Wis. Stat. § 972.03, petitioner was granted seven peremptories. He used three of them to remove Goldberg, Weidler and Tonn.

c. Deprivation of Right to a New Trial

Under Lindell, the question of whether a defendant obtains a new trial when he has used peremptory strikes to correct trial court failures to remove biased jurors depends on whether the loss of peremptories affects the defendant's substantial rights. 245 Wis. 2d at 746-47 (citing Wis. Stat. § 805.18(2)). In Lindell, the state supreme court offered little guidance on when the loss of peremptories because of trial court errors might affect a defendant's substantial rights except to say that the loss of one peremptory would not affect such rights, and the loss of most or all peremptories might affect them. Id. However, in the present case, there

can be little doubt that the loss of three peremptory strikes affected petitioner's substantial rights.

As the record indicates, petitioner found it extremely difficult to find jurors who were not predisposed against him. More than eighty percent of the respondents to juror questionnaires said that he was guilty, and many added hostile comments. Under these circumstances, peremptory strikes were particularly precious.

The harm caused by the loss of three strikes was amplified by the trial court's failure to inquire into the improper communications in the jury assembly room. Because the trial court did not attempt to discover which jurors had made the improper statements and whether other jurors had been influenced by them, petitioner knew that some of the jurors in the pool from which his peremptories were exercised were biased against him but he did not know which ones. The loss of peremptories made it less likely that he would be able to eliminate them.

Finally, the loss of peremptories affected petitioner's substantial rights because it prevented him from removing juror Schuenke. When petitioner discovered that Schuenke had written to the court threatening not to decide the case on the merits, he asked the court to remove Schuenke for cause or to question him about whether he could perform his duties as a juror. When the court denied both requests, petitioner faced a dilemma with respect to the exercise of his peremptory strikes. Petitioner made a record on the issue advising the court that he had planned to use his seven peremptories to strike jurors who he had unsuccessfully challenged for cause (including Goldberg, Weidler and Tonn), but that he was now faced with a juror who had threatened to "vote either way just to end it," and he had no peremptories available to remove him. (App. at 322-23.)

Thus, the trial court's errors with respect to Goldberg, Weidler and Tonn prevented petitioner from exercising a peremptory strike to remove Schuenke. Whether Schuenke was an irresponsible juror, as indicated by his letter, or a biased one, as indicated by his statements in the jury assembly room, petitioner had cause to remove him. Both Ross and Martinez-Salazar make clear that when a defendant's loss of peremptories due to trial court failures to remove biased jurors causes a biased juror to sit on the jury, due process and the right to an impartial jury are denied. Martinez-Salazar, 528 U.S. at 316 ("Nor did the [trial court's error] result in the seating of any juror who should have been dismissed for cause. As we have recognized, that circumstance would require reversal.") (citing Ross, 487 U.S. at 85).

3. Conclusion

Thus, petitioner was deprived of important rights conferred on him by state law with respect to jury selection. He was deprived of the right to have the court remove biased jurors and, as a result, was deprived of three peremptory strikes. Moreover, the loss of the three peremptory strikes affected his substantial rights and, therefore, entitled him to a new trial. However, based on its unreasonable finding that Goldberg, Weidler and Tonn would have been impartial jurors, the state court of appeals deprived him of this right also. Thus, he did not receive "all that was due [him] under [state] law." Ross, 487 U.S. at 91. Therefore, he was denied due process.

Further, because the trial court's errors also resulted in at least one biased juror being seated, such errors also denied petitioner an impartial jury. For both these reasons, the writ must issue pursuant to 28 U.S.C. § 2254(d)(2).

IV. CONCLUSION

The harmless error doctrine does not bar issuance of the writ. Denial of the right to an unbiased tribunal is one of those trial errors that is not excused by being shown to be harmless. Thompson, 248 F.3d at 622 (citing Gray v. Mississippi, 481 U.S. 648, 668 (1987)). Finally, because I have determined that the writ must be granted for the reasons stated above, I do not address petitioner's claim of ineffective assistance.

Therefore,

IT IS ORDERED that the petition for the writ of habeas corpus is **GRANTED**.

In order to afford the state the opportunity to retry petitioner, **IT IS FURTHER ORDERED** that the execution of this order is **STAYED** for 180 days.

Dated at Milwaukee, Wisconsin, this 26 day of March, 2003.

LYNN ADELMAN
District Judge

STATE OF WISCONSIN : IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,
v.
THEODORE OSWALD,
DEFENDANT-APPELLANT.

COURT OF APPEALS
DECISION
DATED AND FILED
December 8, 1999
Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

APPEAL from a judgment and an order of the circuit court for Waukesha County: LEE S. DREYFUS, JR., Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1. ANDERSON, J. Theodore Oswald appeals from a nineteen-count judgment of conviction and an order denying his motion for postconviction relief. A new trial is warranted, he argues, because of juror bias, juror misconduct and ineffective assistance of trial counsel. First, he contends that the circuit court erroneously denied his motions to remove three jurors for cause, forcing him to use his peremptory strikes to remove them. Because he used his peremptory strikes to correct a court error, he requests a new trial where he would receive his full statutory entitlement of peremptory strikes.

¶2. Additionally, Oswald insists that during voir dire prospective jurors discussed their opinions about his guilt and the case while in the waiting room. Claiming that the court erroneously exercised its discretion by failing to properly investigate the misconduct allegations, he requests a new trial.

¶3. Lastly, Oswald contends that he was denied effective assistance of counsel because his trial counsel: (1) erroneously conducted voir dire, (2) failed to request a change of venue, and (3) failed to properly investigate and pursue a mental disease or defect defense. We reject these arguments and affirm.

¶4. A detailed discussion of Oswald's criminal activities is not necessary for this appeal. Suffice it to say, Oswald's conviction flows from the armed robbery of three financial institutions, a kidnapping and a running gun battle with law enforcement after the third robbery.[1] During the chase and gun battle, a police captain was killed, and a hostage and three police officers were wounded. Oswald participated in the crimes with his father, James Oswald. The Oswald crime spree generated extensive coverage from the print and electronic media. Understandably, the pretrial publicity permeated the jury selection process, requiring the circuit court to call a large panel, to use written questionnaires for screening the panel of prospective jurors and to conduct individual voir dire.

¶5. After a three-week jury trial, Oswald was found guilty on all counts and sentenced.[2] He then moved the court

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[1] For a more thorough factual discussion, *see* ***State v. James Oswald***, 2000 WI App 3, 2, 232 Wis. 2d 103, 606 N.W.2d 238.

[2] Oswald was convicted of three counts of party to the crime of aiding and abetting an armed robbery while concealing identity, see § § 939.05(2)(b), 943.32(2) and 939.641, stats.; one count of party to a conspiracy to commit first-degree intentional homicide by using a bulletproof vest and a dangerous weapon plus one count of an attempt of the same crime, see § § 939.05(2)(c), 940.01(1), 939.63(1)(a), 939.64(2) and 939.32(1)(a), stats.; one count of party to the crime of aiding and abetting the armed taking of a vehicle without consent, using a bulletproof vest, see § § 939.05(2)(b), 943.23(1g) and 939.64(2), stats.; one count of party to the crime of aiding and abetting armed burglary

for a new trial. He argued that a new trial was warranted because of juror bias and misconduct and the ineffectiveness of his trial counsel. His postconviction motion was denied. Oswald reasserts these arguments on appeal.

JUROR BIAS

BACKGROUND

¶6. A few weeks before trial, the court heard arguments regarding jury selection. The court determined that three alternate jurors would be impaneled, resulting in a fifteen-member jury panel selected from a twenty-nine person jury pool. Because alternate jurors would be seated, each party was granted an additional peremptory strike or seven total strikes. Oswald's motions to use juror questionnaires and to conduct individual voir dire of the jurors were both granted.

¶7. Voir dire took place over four days. During the course of voir dire, Oswald moved the court to strike twenty-seven jurors for cause. The court granted all but six of Oswald's requests to strike. On appeal, Oswald argues that

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using a bulletproof vest, see § § 939.05(2)(b), 943.10(2)(a) and 939.64(2), stats.; one count of party to the crime of aiding and abetting the armed taking of hostages by force or threat using a bulletproof vest, see § § 939.05(2)(b), 940.305, 939.63(1)(a)2 and 939.64(2), stats.; one count of party to the crime of aiding and abetting the armed operation of a motor vehicle without consent, using a bulletproof vest, see § § 939.05(2)(b), 943.23(3), 939.63(1)(a) and 939.64(2), stats.; eight counts of party to the crime of aiding and abetting attempted first-degree intentional homicide using a bulletproof vest and a dangerous weapon, see § § 939.05(2)(b), 939.32(1)(a), 940.01(1), 939.63(1)(a)2 and 939.64(2); and one count of party to the crime of aiding and abetting first-degree recklessly endangering safety using a bulletproof vest and a dangerous weapon, see § § 939.05(2)(b), 941.30(1), 939.63(1)(a)2 and 939.64(2), stats. He was sentenced to serve 565 years in prison consecutive to two life sentences (in addition to ten years to be served concurrently).

the trial court erred by not striking three of these jurors for cause, and, because of this, he should be given a new trial. He contends that each of these jurors had exhibited bias by his or her strong and firmly held opinion that he was guilty of the charged crimes. In addition, he argues that because the court failed to dismiss these jurors for cause, he was forced to use his peremptory challenges to remove them and, as a result, was deprived of the full number of peremptory challenges.

¶8. We begin by noting that this case was not typical, as was highlighted by the court's willingness to adopt special jury selection procedures. This case was unique not only because of the enormous media coverage of the charged criminal activities, but also because of defense counsel's plan to turn the media coverage into a positive factor for his client. Because the media had consistently portrayed Oswald as an impressionable teenager who was victimized by his abusive and manipulating father, defense counsel desired jurors who had heard or read such media reports. Defense counsel reasoned that a juror with such knowledge would likely support the planned defense strategy--coercion. Oswald's strategy was not to contest his physical participation in the crimes but, instead, to focus on the theory that he participated in the crimes because he was coerced to do so by his father. Counsel believed that the media reports contained information that might not be admissible at trial. As an important circumstance of this case, we will bear in mind Oswald's theory of defense while reviewing the record for jury selection

THE JURORS

¶9. Oswald objects that the first juror questioned during voir dire, Jan G., should have been dismissed for cause. During preliminary questioning by the circuit court,

Jan G. stated that based on pretrial publicity and his own personal morals, he had reached the opinion that Oswald was guilty. During continued questioning, Jan G. said that "it would probably be very difficult" to put aside what he had learned about the case and reach a verdict on the evidence presented in the courtroom.

¶10. When quizzed by the prosecutor about whether he could put aside what he had heard and read, Jan G. responded, "I would hope that I'd have an open mind enough to be able to do that.... I'd try." He later agreed that he would try to decide the case solely on the evidence he heard during the trial. However, in response to questions from defense counsel, Jan G. admitted it would be very difficult for him to keep an open mind. He admitted during further questioning that he believed he should not be a juror because he felt so strongly about Oswald's guilt.[3] The circuit court failed to ask any follow-up questions. Oswald's counsel moved to strike him for cause. After hearing arguments from both counsel regarding the motion to strike, the court denied the motion. It concluded that although Jan G.'s answers gave mixed messages, he clearly responded that he would be able to follow the court's instructions.

¶11. Next, Oswald objects that Edward T. should have been dismissed for cause. Edward T. revealed in his juror questionnaire that he had seen the video tape of Oswald's gun battle and capture on television at least ten times. The court questioned Edward T. about what he specifically remembered from the video tape. He replied, "It's obvious that [Oswald] was in the van and was taking part in the--in both the shooting, robbery, kidnapping and

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[3] Jan G. had completed a written juror questionnaire prior to voir dire. Responding to a question about his opinion of Oswald's guilt, he commented, "Yes, guilty. No doubt in my mind that he was involved with his father."

whatnot, so I would say that my opinion would be that he would be guilty." Nevertheless, when informed by the prosecutor that the video tape would be shown during the trial, Edward T. agreed that viewing the video tape as evidence would make it easier for him to follow the judge's instructions to consider only the evidence admitted at trial. However, when asked by defense counsel if his opinion about Oswald's guilt was based on both the video tape and the printed media reports, Edward T. replied "yes" and that he would not be able to put those opinions aside. In a follow-up question by the prosecutor, Edward T. again stated that if the evidence included the video tape he would be able to set aside his opinions.[4] The circuit court did not pursue any follow-up questioning of Edward T. In denying Oswald's challenge for cause, the court stated that Edward T. was nervous and there were "inconsistent answers to questions." The court reasoned that "he was trying to answer the questions presented to him as forthrightly and as completely as possible."

¶12. The final juror that Oswald argues should have been stricken for cause was Marcia W. Marcia W. told the court that Oswald's taking a housewife hostage traumatized her, and, as a result, she "might not be able to be really fair." She admitted that she did consider Oswald guilty based upon a video tape of the incident that she had seen on television. Although she agreed that she would try to put what she knew out of her mind, she remarked that she was not sure if she could totally block it out. Defense counsel asked a series of questions relative to Marcia W.'s openness to the presentation of a coercion defense. In her responses, she revealed that the previous night she had received a phone

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[4] In his questionnaire, Edward T. wrote that he believed Oswald to be guilty "because of collection of guns and premeditation of robberies and escape at all cost."

call from her church's prayer chain and was told that she should not only pray for Oswald, but "for those people who would sit in judgment." She stated that she "felt a lot of pressure."

¶13. When further questioned about her opinion of the coercion defense, Marcia W. replied that after the phone call she was up all night and that she believed, "[Y]ou have a choice and that there--I'm sure that every time anybody takes an action many things build into that and cause you to do different things and I'm not saying that isn't valid. I still feel that's not an excuse for a--I think we all know right from wrong." When asked directly if she could follow the court's instructions on a coercion defense, Marcia W. replied that she would try but was not sure if she could. After being instructed on the coercion defense by the court, Marcia W. stated, "I guess I probably have a problem with that part of the law, umm, my conservative mind but I would try."[5]

¶14. Defense counsel moved to strike Marcia W. on the grounds that she was traumatized from the incident because she identified with the hostage and she was not sure she could follow instructions on the coercion defense. The circuit court denied the motion, holding that Marcia W.'s trauma from hearing about the incident was not unusual and there was no evidence that "she was in any way reactive ... to Theodore Oswald." The court failed to address the portion of counsel's motion challenging Marcia W.'s ability to follow the coercion instructions.

¶15. Because the court did not grant Oswald's motions to remove these three jurors for cause, Oswald used

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[5] In her questionnaire, Marcia W. wrote that her reaction to the video tape of the gun battle and subsequent apprehension of Oswald was "[g]uilt, disgust and fear."

three of his seven peremptory strikes to remove them from the jury pool. He insists that the court erroneously exercised its discretion by failing to remove the jurors. This failure is grounds for reversal, he contends, because it forced him to use peremptory strikes to remove jurors who should have been stricken for cause, thus depriving him of his full statutory entitlement of peremptory challenges.

DISCUSSION

¶16. The United States and Wisconsin Constitutions guarantee a criminal defendant the right to a trial by an impartial jury. See U.S. CONST. amend. VI; WIS. CONST. art. I, § 7. A juror who "has expressed or formed any opinion, or is aware of any bias or prejudice in the case" should be removed from the panel. See § 805.08(1), stats. Additionally, "[i]f a juror is not indifferent in the case, the juror shall be excused." ***Id.***

¶17. Courts should strive to avoid even the appearance of bias. *See* ***State v. Louis***, 156 Wis. 2d 470, 478, 457 N.W.2d 484, 488 (1990). In ***State v. Faucher***, 227 Wis. 2d 700, 716, 596 N.W.2d 770, 777 (1999), our supreme court clarified the terminology to be used when examining juror bias. We will determine a prospective juror is biased and therefore should be removed for cause if the prospective juror is (1) statutorily biased, (2) subjectively biased or (3) objectively biased. *See* ***id.***

A. Statutory Bias

¶18.A prospective juror is statutorily biased if the prospective juror falls into one of the groups the legislature has deemed are biased as a matter of law in § 805.08(1), stats. *See* ***Faucher***, 227 Wis. 2d at 717, 596 N.W.2d at 778. Prospective jurors are statutorily biased if they are related by

"blood or marriage to any party or to any attorney appearing in the case" or if they "[have] any financial interest in the case." See § 805.08(1). "Statutory bias is a conclusion of law premised on the belief that certain relationships are so inherently prone to partiality that an individual case-by-case inquiry is not worth the time or effort." ***State v. Kiernan***, 227 Wis. 2d 736, 744, 596 N.W.2d 760, 764 (1999). Neither party suggests that any juror should have been removed for statutory bias because he or she fell into one of the § 805.08(1) categories of excluded persons. Accordingly, we will only discuss the subjective and objective prongs for juror bias..

B. Subjective Bias

¶19.A prospective juror is subjectively biased if the record reflects that the juror is not a reasonable person who is sincerely willing to set aside any opinion or prior knowledge that the prospective juror might have. *See* ***Kiernan***, 227 Wis. 2d at 745, 596 N.W.2d at 764. "[S]ubjective bias refers to the bias that is revealed by the prospective juror on voir dire: it refers to the prospective juror's state of mind." ***Faucher***, 227 Wis. 2d at 717, 596 N.W.2d at 778. Most frequently, a prospective juror will not explicitly admit to a prejudice or inability to set aside this prejudice. Through the juror's verbal responses to voir dire questions and his or her demeanor, the court can assess if the juror is subjectively biased. *See* ***Kiernan***, 227 Wis. 2d at 745, 596 N.W.2d at 764. The court's determination of whether a juror is subjectively biased is a factual finding and will be upheld unless clearly erroneous. *See* ***id.*** We will now review the court's determination that none of the prospective jurors in question were subjectively biased.

¶20. Jan G. repeatedly expressed doubts about his ability to ignore his opinions formed from pretrial publicity

and his personal morals, but he also repeatedly affirmed his willingness to attempt to put aside his opinions and judge the case based on the evidence presented. He candidly confessed that he felt he was not the best choice for a juror because of his beliefs. The court considered the prosecutor's argument that every juror in the jury pool would have some feelings toward Oswald based on the media coverage but that this alone should not disqualify a juror. Rather, the prosecutor pointed out that a juror should only be disqualified if he or she were unable to set this opinion aside.

¶21. The circuit court determined that Jan G. was not subjectively biased. It believed that "he, clearly, responded that he would try to follow whatever the court's instructions are and, essentially, be fair and impartial ...." The record supports the court's finding that Jan G. was a reasonable person and that he was sincere in his willingness to set aside his opinion. "[A] prospective juror need not respond to voir dire questions with unequivocal declarations of impartiality." ***State v. Erickson***, 227 Wis. 2d 758, 776, 596 N.W.2d 749, 759 (1999), *cert. denied*, No. 99-6572, 2000 WL 48821 (Jan. 24, 2000). The court's conclusion that Jan G. was not subjectively biased is not clearly erroneous.

¶22. Edward T. gave conflicting answers when questioned about whether he would be able to put his opinions aside. He first stated "no," rationalizing that because he had seen multiple airings of the video tape depicting some of the alleged criminal activities, he was convinced of Oswald's guilt. However, after being informed that the video tape would most likely be shown to the jury and could be considered as evidence, he felt he could put his opinions aside. The court believed that Edward T. gave conflicting answers because he was trying very hard to be forthright and was nervous. Such a determination relies on the juror's demeanor while being questioned. Whether a

juror is subjectively biased will frequently "only be revealed through his or her demeanor." *See* ***Faucher***, 227 Wis. 2d at 718, 596 N.W.2d at 778. The court correctly relied on Edward T.'s demeanor to judge if he was subjectively biased. "[T]he circuit court sits in a superior position to assess the demeanor and disposition of prospective jurors." Id. Accordingly, we agree with the court's finding that Edward T. was not subjectively biased.

¶23. Marcia W. also expressed concerns about her ability to be fair, particularly regarding a coercion defense. She also confessed to personally having traumatic feelings from news reports that Oswald allegedly took a housewife hostage. However, she repeatedly stated that she would try to put her opinions aside and follow the court's instructions.

¶24 The court found no subjective bias. It reasoned that Marcia W.'s feelings of trauma were nothing unusual and were in fact feelings of putting herself in the same position as the hostage, which was exactly what a juror would be asked to do during the trial. Indeed, a court is expected to "use voir dire to explore a prospective juror's fears, biases, and predilections and fully expect a juror's honest answers at times to be less than unequivocal." ***Erickson***, 227 Wis. 2d at 776, 596 N.W.2d at 759. The court accepted Marcia W.'s affirmations that she would try to set aside her opinions. We find that the court's determination was not clearly erroneous. None of the jurors in question should have been dismissed for cause on grounds of subjective bias.

C. Objective Bias

¶25.A prospective juror is objectively biased if "a reasonable person in the prospective juror's position objectively could not judge the case in a fair and impartial

manner." ***Id.*** at 775, 596 N.W.2d at 759. When determining if a juror is objectively biased, the circuit court should consider the facts involved in the case and the facts and circumstances surrounding the voir dire. *See* ***Faucher***, 227 Wis. 2d at 718, 596 N.W.2d at 779. For example, when there is evidence from voir dire that a prospective juror has formed an opinion or has prior knowledge, a court must ask if a reasonable person in the juror's position could set aside the opinion or prior knowledge. *See* ***id.*** at 719, 596 N.W.2d at 779. A court's conclusion on whether a prospective juror is objectively biased is a mixed question of law and fact. *See* ***id.*** at 720, 596 N.W.2d at 779. We will give weight to this conclusion during our review and will reverse it only if a reasonable judge could not have reached it as a matter of law. *See* ***id.*** at 721, 596 N.W.2d at 779-80.

¶26 Courts have found objective bias or that a reasonable person in the prospective juror's position would not be able to be impartial if, for example, a prospective juror is related to a state's witness by blood or marriage to the third degree or if the prospective juror has a recent and continuous contact with the criminal justice system. *See* ***State v. Gesch***, 167 Wis. 2d 660, 671, 482 N.W.2d 99, 104 (1992); ***State v. Mendoza***, 227 Wis. 2d 838, 854, 596 N.W.2d 736, 744 (1999). On the other hand, if a veteran juror was impaneled on a similar type of case, he or she will not be considered impartial per se but must exhibit bias about the specific case or issues he or she is called to hear. *See* ***Kiernan***, 227 Wis. 2d at 749, 596 N.W.2d at 766. The prospective juror must demonstrate an ingrained attitude about the particular subject of the case. *See* ***Mendoza***, 227 Wis. 2d at 850 n. 6, 596 N.W.2d at 742. There must be a connection between the prospective juror's bias and the issues or theory of the case. These attitudes or opinions must be strongly held, *see* ***Faucher***, 227 Wis. 2d at 735, 596

N.W.2d at 786, but are not expected to be unequivocal, *see* ***Kiernan***, 227 Wis. 2d at 750 n. 10, 596 N.W.2d at 767.

¶27 From an objective viewpoint, the criminal activities in this case were widely publicized. Yet, we do not expect that prospective jurors will not have formed opinions from such media exposure; our concern is if a reasonable person in the prospective juror's position would have the ability to put aside these opinions and consider the case based on the evidence presented at trial.[6]

¶28. In this case, the circuit court did not have the benefit of the recent supreme court cases and therefore did not address whether the prospective jurors were objectively biased. We will independently examine the record to determine whether it supports a determination that they were not objectively biased. We are mindful that we are admonished to consider the facts and circumstances of voir

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[6] In ***State v. Herrington***, 41 Wis. 2d 757, 765, 165 N.W.2d 120, 123-24 (1969) (quoting ***Irvin v. Dowd***, 366 U.S. 717, 722-23 (1961)), the supreme court stated:

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

dire along with the facts involved in the case. *See* ***Faucher***, 227 Wis. 2d at 718, 596 N.W.2d at 779. As we consider this point, we initially must disagree with Oswald's chief argument, supporting his contention that the prospective jurors were objectively biased and should have been dismissed for cause.

¶29. In his brief, Oswald claims that all the prospective jurors expressed strong opinions that he was guilty. These opinions, he argues, go "straight to the heart of the issue: their ability to presume the defendant innocent unless proven guilty of the charges." However, the facts and circumstances of this case reveal that this statement is incorrect. For Oswald, the heart of the issue during voir dire was securing a jury amenable to his coercion defense strategy. As a part of this strategy, Oswald was opting not to contest his participation in the crimes. His tactical decision was not to protest his guilt. This strategy involved searching for a particular type of juror; this ideal juror would not presume that Oswald was innocent but would be influenced by the media coverage and also could be supportive of a coercion defense. The particular type of juror that Oswald sought is an important circumstance surrounding the voir dire.

¶30 Considering that the defense sought jurors amenable to its coercion defense, the State argues that a reasonable juror would have misconceptions about what such a defense means. It points out that the prospective jurors were asked about their receptivity to a defense, but it was never fully explained to them. A reasonable juror, it contends, would have viewed this case primarily as a homicide and most of the questions on coercion seemed to imply that this was a complete defense to all the charges.

¶31 We agree that this is a reasonable inference to draw from the voir dire. For instance, Marcia W. initially remarked that she probably could not consider a coercion defense because people make their own choices and cannot later seek to be excused from them. However, after the judge briefly summarized how a coercion defense would be applied in the case, she stated that she might still have a problem with such a coercion defense but she could try to consider it. A reasonable person would respond with reservations to questions about a legal defense that he or she did not completely understand and possibly assumed might relieve the defendant of guilt. Under the circumstances, Marcia W. replied in the manner that any reasonable person would. She affirmed her willingness to try to follow the court's instructions but confessed her trepidation. A reasonable person in Marcia W.'s position could set aside his or her prior opinions and judge the case impartially. We conclude that Marcia W. was not objectively biased.

¶32 In addition to Marcia W., Oswald also argues that Jan G. and Edward T. were objectively biased because of their strong opinions that he was guilty. First, we question the strength of these jurors' opinions. Both jurors equivocated in the answers and messages they gave the court. Second, we again note that the defense strategy employed at voir dire was not to secure a jury panel consisting of only jurors who stated they could presume Oswald innocent until proven guilty; rather, the defense sought jurors with some awareness of the media coverage and an amenability to a coercion defense.

¶33 Recently, the ***Faucher*** court determined that a prospective juror was objectively biased because of the strength of his opinion about a case's crucial witness. *See* ***Faucher***, 227 Wis. 2d at 733, 596 N.W.2d at 785. In reaching this conclusion, the court focused on the juror's

"strongly held belief" about the case's crucial witness. *See* ***id***. In contrast, the present situation differs because unlike the ***Faucher*** juror, the strength of the prospective jurors' opinions changed during the voir dire and, importantly, their opinions did not concern the central issue in the case.

¶34 In the present case, both Jan G. and Edward T. equivocated in their responses regarding their abilities to put aside their opinions. When they changed their initial responses from not being able to set aside their guilty opinions to a sincere willingness to try to do so, they showed that these opinions were not ingrained attitudes. Furthermore, Oswald's primary concern during voir dire was to seat jurors who could potentially support his coercion defense strategy. Following this strategy, Oswald's defense sought jurors exposed to the media coverage about the crimes and his father's behavior and, yet, open to believing that Oswald was coerced to perform those acts. This defense theory was the crucial issue in this case and neither Jan G.'s. nor Edward T.'s opinion that Oswald was guilty would prevent them from judging the defense's theory in a fair and impartial manner.

¶35 Each prospective juror candidly confessed any preconceived opinions he or she held. The prospective jurors each waivered when questioned about the strength of these opinions--whether these prior opinions were so strong they could not be disregarded. Like any reasonable person who is unfamiliar with serving as a juror and what will be expected of him or her in that role, the prospective jurors informed the court that they had opinions that Oswald was guilty, but that they were willing and would try to follow the court's instructions to put these prior opinions aside and consider only the evidence presented at trial. Although each juror initially assured the court that his or her guilty opinions were firm, their responses to further questioning revealed

that these prior opinions were not ingrained attitudes unchangeable by court instructions and the presentation of evidence.

¶36 Considering the special facts and circumstances surrounding this voir dire, we conclude that a reasonable person in Jan G.'s or Edward T.'s position could set aside his or her prior opinions. The record shows that neither Jan G. nor Edward T. was objectively biased.

¶37 In sum, we determine that the prospective jurors should not have been dismissed for cause. The court did not err when it denied Oswald's motions to strike these jurors because the prospective jurors were not statutorily, subjectively or objectively biased. Because Oswald has failed to demonstrate that the prospective jurors were in fact biased and the court erred by denying his motions to strike them, his argument that he was denied his full statutory entitlement to peremptory strikes because of his efforts to correct the court's error has no merit and fails.

JUROR MISCONDUCT

¶38 Oswald argues that on the fourth day of voir dire the court misused its discretion when it denied his request for an investigation into allegations of possible juror misconduct. The allegations of possible juror misconduct initially arose during the voir dire of prospective juror Roger K. When the court asked him about how much media exposure he had had, Roger K. replied, "I know I've learned more in the last 3 days here sitting down there in that [waiting] room about this case than I have since the day that it happened."

¶39 After Roger K.'s admission, Oswald requested that the court strike him for cause and conduct an

investigation into the content of prospective jurors' conversations in the waiting room. The court denied both requests.[7] However, the court permitted the defense to question the remaining prospective jurors about the waiting room conversations but did not call any previously questioned jurors back to be examined on this topic. The defense questioned the remaining prospective jurors and the bailiff who supervised the waiting room. Two of the jurors who were questioned admitted that conversations about Oswald's guilt took place in the waiting room.[8] Oswald again requested that the court conduct an inquiry of the jurors who had previously been qualified to serve on the panel and determine if they had participated in or been affected by the discussions of Oswald's guilt. This request was also denied.

¶40 At the postconviction hearing, Oswald's only additional evidence of juror misconduct was the testimony of prospective juror Jacqueline M. who had been stricken from the jury panel. Jacqueline M. testified that while in the waiting room, she heard at least three prospective jurors express opinions that Oswald was guilty and that the trial was a joke and a waste of time. She stated that one of these jurors, William S., was seated on the jury panel that decided the case.

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[7] Circuit courts are cautioned to err on the side of granting motions to remove jurors for cause because such a practice avoids the appearance of bias and in the long run may save the judiciary's time and resources. *See* ***State v. Mendoza***, 227 Wis. 2d 838, 864, 596 N.W.2d 736, 749 (1999). In this case, the court granted twenty-one of Oswald's twenty-seven motions to strike jurors for cause. Oswald does not appeal the court's denial of his motion to strike Roger K.

[8] For example, one juror testified that none of the other prospective jurors was trying to convince him of a certain opinion but would express opinions that Oswald was guilty.

¶41 In its oral decision denying Oswald's postconviction motion for a new trial, the court stated that it did not find Jacqueline M. to be credible. It noted that she had had many opportunities to report the alleged discussions to the court or bailiff but never mentioned them until she was contacted by the defense's investigators. The court inferred that because the defense presented no other witnesses to support its claim besides Jacqueline M. that no other witnesses supported her assertions. Most significantly, the court stressed that she had given false answers on her juror questionnaire. In response to questions about if she had any physical or emotional problems which might interfere with jury service, if she had ever been the victim of physical violence, and if she had been involved in a violent or assaultive relationship, Jacqueline M. said "no."

¶42 To the contrary on cross-examination during voir dire, she testified that twenty-three days before signing her questionnaire she was physically assaulted by her husband with a fireplace poker and during the assault feared that her life was in imminent danger. She also testified that the police had been called to her home to remove her son, that the police noted that she had been drinking alcohol, and that this was a period of significant turmoil in her life in which she was prescribed psychotropic medications. The court concluded that Jacqueline M.'s testimony was unreliable because these events occurred within two or three weeks of her filling out the juror questionnaire, and on the questionnaire she failed to include them. The court also held that Oswald failed to make a sufficient showing that misconduct occurred.

¶43 On appeal, Oswald apparently argues that the trial court erred by denying his request to further inquire into the juror misconduct allegations because it prevented him from learning whether William S. gave false answers during

voir dire and was actually biased. He claims that William S. did not admit to such a strong conviction of Oswald's guilt during voir dire as Jacqueline M. alleges he expressed in the waiting room. Because a prospective juror incorrectly answered a material question during voir dire, he requests a new trial.

¶44 A trial court has broad discretion over how a voir dire examination is conducted, including the form and number of questions asked of prospective jurors. *See* ***Hammill v. State***, 89 Wis. 2d 404, 408, 278 N.W.2d 821, 822 (1979). Accordingly, we will not disturb the court's voir dire decisions without a showing that the court misused its discretion. *See* ***id.*** at 408, 278 N.W.2d at 822-23.

¶45 After a review of the voir dire and postconviction hearing records, we too conclude that Oswald failed to make a sufficient showing of juror misconduct to warrant a new trial. Oswald bases his claim of juror misconduct on his allegation that William S. gave false answers to voir dire questions. When a prospective juror gives erroneous answers during voir dire, a new trial will only be awarded if "the juror incorrectly or incompletely responded to a material question on voir dire; and if so, ... it is more probable than not that under the facts and circumstances surrounding the particular case, the juror was biased against the moving party." ***State v. Wyss***, 124 Wis. 2d 681, 726, 370 N.W.2d 745, 766 (1985), *overruled on other grounds by* ***State v. Poellinger***, 153 Wis. 2d 493, 451 N.W.2d 752 (1990). Therefore, Oswald must show that the court erred by denying his request to investigate the previously impaneled jurors because if the court had granted it, information would have arisen that William S. gave incorrect answers to a material question and was prejudiced against him. Oswald has failed to demonstrate either of these factors.

¶46 First, Oswald fails to produce evidence that William S. gave an incorrect voir dire answer. Assuming the veracity of Jacqueline M.'s testimony, her allegation is that the prospective jurors in the waiting room discussed opinions that Oswald was guilty. This is entirely consistent with the opinion William S. expressed in voir dire questioning. William S. admitted that he did have an opinion in his juror questionnaire and in voir dire questioning. He testified that from what he had seen, he would have a hard time believing that Oswald was not involved. But, he also expressed a willingness and ability to put his opinion aside and listen to the evidence. Accordingly, Oswald does not provide evidence showing that William S. lied during voir dire because William S.'s admissions during voir dire were consistent with the alleged waiting room conversations.

¶47 Second, Oswald does not demonstrate that William S. was prejudiced against him. Considering Jacqueline M.'s characterization of the prospective juror discussions in the context of William S.'s voir dire answers, it appears that the prospective jurors were referring to their opinions that based on the pretrial publicity and media coverage, Oswald participated in the charged crimes. As we have previously discussed, if a prospective juror held the opinion that Oswald participated in the crimes, the prospective juror was not biased against Oswald because such an opinion was consistent with his coercion defense strategy.[9] Based on these reasons, we find that Oswald did not sufficiently prove that William S. gave incorrect voir dire answers or was prejudiced against him. The court's denial of Oswald's motion for a new trial was a proper exercise of discretion.

INEFFECTIVE ASSISTANCE OF COUNSEL

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[9] *See supra* text pp. 212, 216.

¶48 Oswald argues that he was denied effective assistance of trial counsel in three respects. First, he maintains that counsel conducted voir dire in a deficient manner. Second, he insists that because of the continuous and pervasive publicity that created a "circus-like atmosphere" for his trial, his counsel was deficient for failing to request a change of venue. Lastly, he objects to his counsel's failure to properly investigate and advance a mental disease or defect defense.

¶49 There are two components to a claim of ineffective assistance of counsel: a demonstration that counsel's performance was deficient and a demonstration that such deficient performance prejudiced the defendant. *See* ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379, 386 (1997). Oswald has the burden to prove both components. *See* ***id.*** An attorney's performance is not deficient unless it is shown that "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." ***State v. Guck***, 170 Wis. 2d 661, 669, 490 N.W.2d 34, 38 (Ct. App. 1992) (citation omitted). We thus assess whether such performance was reasonable under the circumstances of the particular case. *See* ***State v. Hubanks***, 173 Wis. 2d 1, 25, 496 N.W.2d 96, 105 (Ct. App. 1992). Deficient performance is limited to situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue. *See* ***State v. McMahon***, 186 Wis. 2d 68, 85, 519 N.W.2d 621, 628 (Ct. App. 1994).

¶50 Even if deficient performance is found, we will not reverse unless the defendant proves that the deficiency actually prejudiced his or her defense: that counsel's errors were so serious as to deprive the defendant of a fair trial--a trial whose result is reliable. *See* ***State v. Johnson***, 153 Wis.

2d 121, 127, 449 N.W.2d 845, 848 (1990). In other words, errors of counsel must actually have an adverse effect on the defense, for not every error that conceivably could have influenced the outcome undermines the reliability of the result in the proceeding. "[T]here [must be] a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 129, 449 N.W.2d at 848 (citation omitted).

¶51 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711, 714 (1985). We will not overturn a circuit court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy unless the findings are clearly erroneous. *See* ***State v. Knight***, 168 Wis. 2d 509, 514 n. 2, 484 N.W.2d 540, 541 (1992). However, the final determinations of whether counsel's performance was deficient and prejudiced the defense are questions of law which this court decides without deference to the circuit court. *See* ***id.***

A. Voir Dire

¶52 Oswald contends that his counsel's performance during voir dire was deficient during the questioning of three prospective jurors. Counsel's performance was ineffective, he argues, because these jurors admitted bias and counsel failed to ask follow-up questions of them or move the court to strike them for cause. To the contrary, after reviewing the record of voir dire and counsel's ***Machner*** [10] testimony, we

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[10] ***State v. Machner***, 101 Wis. 2d 79, 303 N.W.2d 633 (1981)

conclude that counsel's conduct of voir dire was not deficient.

¶53 Oswald argues that his counsel conducted voir dire in the same manner as was held deficient in ***State v. Traylor***, 170 Wis. 2d 393, 489 N.W.2d 626 (Ct. App. 1992), and ***State v. Zurfluh***, 134 Wis. 2d 436, 397 N.W.2d 154 (Ct. App. 1986). In ***Zurfluh***, a prospective juror expressed to the court during voir dire that she felt she "might not be able to be fair." *See* ***Zurfluh***, 134 Wis. 2d at 439, 397 N.W.2d at 155. The court proceeded to explain a juror's duties, and the prospective juror replied that she understood them. Next, the court asked her if she would have a problem making a fair and impartial determination of the evidence. The prospective juror replied: "I don't know. I might. I'm afraid I might. I wouldn't want to have; but I'm afraid I might. I'm just being honest." ***Id.***

¶54 The circuit court refused to remove the juror for cause. See id. It believed that the prospective juror, despite expressing difficulties, could still impartially decide the case. We disagreed. *See* ***id.*** We held that because the prospective juror expressed significant doubts in her ability to decide the case fairly and impartially, the court should have further questioned her about these doubts. *See* ***id.*** Without any additional clarification of the prospective juror's doubts, we determined that she was partial and should have been dismissed for cause. *See* ***id.***

¶55 The ***Traylor*** court applied the ***Zurfluh*** holding and found a defense counsel's performance deficient for failing to ask follow-up questions of a prospective juror that would conclusively determine whether the prospective juror would follow the law as instructed by the court. *See* ***Traylor***, 170 Wis. 2d at 399, 489 N.W.2d at 628. For example, counsel performed deficiently by not assessing through

follow-up questions whether a prospective juror would follow the court's instructions when the prospective juror only stated that she "would try" to follow them. *See* ***id.*** at 398, 489 N.W.2d at 628. We held that counsel should have sought a more conclusive response from the prospective juror about her ability to follow the law as instructed by the court, and if counsel failed to receive a satisfactory answer, counsel should have moved to strike the juror for cause. *See* ***id.*** at 399-400, 489 N.W.2d at 628.

¶56 With these legal standards in mind, we will now examine defense counsel's contested voir dire conduct. We begin with the questioning of prospective juror, James H. First, the circuit court quizzed James H. about his statement in his questionnaire that "any armed person fleeing from the police tends to appear guilty." James H. reaffirmed to the court that he believed that such acts made an individual appear guilty. However, while responding to questions from the prosecutor, James H. later stated that he believed that he could decide Oswald's guilt or innocence based only on the evidence presented at trial. Defense counsel then asked James H. six questions. Counsel first quizzed the juror about if he had formed any opinions about Oswald's guilt. James H. replied, "[T]ruthfully ... at this point he would appear to be guilty." Counsel responded by asking him how strong this opinion was, if he favored one side or the other, and if he was impartial. James H. admitted that he might not be completely impartial, but that he was a fair man, did not favor one particular side and would listen to arguments and the evidence.

¶57 Oswald also contests his counsel's voir dire questioning of Dorothy L., who stated that she held an opinion that Oswald was guilty. In response to the prosecutor's questions, Dorothy L. stated that she would keep an open mind and listen to the evidence. When

questioned about the hypothetical that if she were asked, would she be able to vote to convict Oswald at that very moment, Dorothy L. responded that she would be unable to do so without the State presenting evidence of the crimes. Defense counsel asked her numerous questions to which she stated that she would do her very best to consider all the evidence, that her mind was not set to the outcome, and that she was willing to hear arguments regarding a coercion defense.

¶58 The final contested voir dire questioning was that of Joy H. Like the other prospective jurors, Joy H. expressed her opinion in her juror questionnaire that Oswald was guilty. When asked by the court about this statement, she replied that she would need to listen to the testimony and evidence before reaching an ultimate decision on Oswald's guilt. The court proceeded to ask her if she could set aside her opinion and make her decision on the evidence presented at trial. Joy H. replied:

> Well, in all honesty I think that would be pretty difficult to do. It's hard for me to understand anybody in this area ... would be able to put that out completely, you know. I mean I wouldn't say that I couldn't try, but I'm saying ... it would be difficult not to have some prior information influence my decision.

¶59 During questioning from the prosecutor, Joy H. stated that just because she has a certain opinion now does not mean that the opinion would not change after the evidence was presented. She stated she would wait until she heard all the evidence to conclusively make up her mind. Again, the prosecutor asked her if she could set her opinion aside and only judge guilt based on the trial evidence. Joy

H. responded: "I know I'm supposed to say yes. I don't know. I don't think so. I think it would be very tough. It would be very optimistic for me to say I could do that.... I don't think it's quite humanly possible to tell you the truth."

¶60 After the prosecutor repeated the question, Joy H. said, "I would hope that I could" set aside my prior opinion and judge the case only on the evidence presented. She then affirmatively answered the prosecutor's question regarding whether she was willing to follow the law per the court's instructions. She replied, "It's difficult but I would try" to be a fair and impartial juror.

¶61 Defense counsel then asked Joy H. numerous questions, including the following excerpted testimony.

> Q ... I know I'm going to be following up on things that I know you have strong opinions.... Is there anything else that you need to tell us about ... your ability to be fair and impartial in this case?
>
> A ... I don't come to the table impartial by any means at this point.
>
> Q Do you find yourself having a bias towards one particular side or the other?
>
> A Yes.... I would be biased against your client.
>
> ....
>
> Q You know, the other thing you said that I wanted to ask you about that you indicated talking about my client you said that young

man that you had an opinion that he needs to take responsibility. Now I'd like to ask you have you formed this opinion now before the case is even started. Do you feel that your mind is set that he is responsible for the offenses he's charged with?

A Is it set like in stone? I have that opinion ... and it is before [the trial] starts ... so I guess the answer is, yes, I do have it. If you're asking could it ever be changed I guess anything is possible.

....

Q I don't want to suggest that it would be required that you have to forget everything that you know because that's not going to be possible either, but I guess we all keep coming back to this point is whether or not ... the opinions that you have are so strong that it's going to make it impossible for you to be impartial in this case? Can you answer that?

A I think ... they probably are. They are strong enough. It would be difficult. It would be difficult.

....

Q I guess I'm just trying to understand whether or not ... [your opinion is] set to the point or so strong ... that you can't be open to hearing both sides and deciding the case just on the evidence and the legal instructions?

> A ... I certainly would listen, I would certainly listen, but I do think that ... my opinions and my bias [are] strong to begin with and I think it would influence or ... it would play a part ... in how I hear the rest of the evidence or what I do with the rest of the evidence.
>
> Q You seem to have some concerns that even though you may be asked to set it aside and decide on the evidence that you couldn't do that?
>
> A Yes, I do have concerns with that.

¶62 After reviewing the voir dire record, two things are apparent. First, each juror expressed an initial opinion that Oswald was guilty and equivocated to some degree in responses to questions about the strength of that opinion and his or her ability to put it aside. Second, the record reveals substantial questioning and dialogue between the jurors and the court, prosecution and defense. In each instance, defense counsel sought clarification of the juror's opinions by asking follow-up questions. Defense counsel conducted much more thorough questioning about the prospective juror's expressed doubts than was conducted in ***Traylor*** or ***Zurfluh***, and his performance cannot be categorized as deficient in this respect.

¶63 However, Oswald raises one additional contention. He claims that his counsel was also deficient for not requesting that these jurors be stricken for cause. Whether defense counsel should move the court to strike a juror for cause is his or her tactical decision to make. *See* ***State v. Brunette***, 220 Wis. 2d 431, 444-45, 583 N.W.2d 174, 180 (Ct. App.), *review denied*, 220 Wis. 2d 366, 585 N.W.2d 158 (1998). To show deficient performance,

Oswald must show that his counsel's representation was objectively unreasonable. *See* ***id.*** at 445-46, 583 N.W.2d at 180.

¶64 At the ***Machner*** hearing, defense counsel testified that he expected that potential jurors would have preconceptions about whether Oswald participated in the crimes due to the extensive media coverage. His main focus in selecting jurors was to seek those who would be open to the coercion defense strategy. He was not overly concerned that a juror had a guilty opinion because such an opinion only addressed the juror's belief that Oswald had participated in the crimes, which would not be contested at trial.

¶65 Counsel testified that he did not request that Joy H. be stricken for cause because there was more to her than just the answers she told the court. "[W]e felt that underneath we had an open-minded person that would really listen to what we were trying to say despite her reservations." Counsel added that he based these conclusions on the following facts: she was married to a university professor, her political and personal beliefs and experiences, and the honesty of her answers. Likewise, counsel testified that he viewed Joy H. and Dorothy L., both mothers, as "inherently more sensitive to the issues." Counsel felt that Dorothy L. expressed some openness to the coercion theory. Counsel was not directly questioned about why he did not move to strike James H.

¶66 Based on counsel's testimony, counsel sought jurors with the ability to be open to considering the theory of defense, in spite of any preconceptions they may have had about Oswald's guilt. He decided that James H., Joy H. and Dorothy L. would all be good jurors because they would be open to the defense's strategy. We conclude that defense

counsel's decisions not to move to strike these jurors were reasonable, tactical decisions and do not constitute deficient performance.

B. Change of Venue

¶67 Oswald asserts that he was denied his right to effective assistance of counsel by his counsel's failure to request a change of venue for his trial. Because the charged criminal activities received enormous media coverage, including live television coverage of his capture, he alleges that the potential jurors in the county were "inflamed and prejudiced." This assertion is proved, he contends, by the fact that in the juror questionnaires the potential jurors not only admitted media exposure, but also evidenced that they were "hopelessly infected with bias[ ]."

¶68 Normally, the proper venue for a criminal trial is the county where the crime was committed. *See* § 971.19(1), stats. A defendant may request the court to change the trial's venue to another county if securing an impartial jury is not possible in the county where the crime occurred. *See* § 971.22(1), stats. When a defendant is represented by counsel, he or she delegates tactical decisions to counsel. *See* ***Brunette***, 220 Wis. 2d at 443, 583 N.W.2d at 179. Whether a case necessitates a change of venue request is such a tactical decision that a criminal defendant has delegated to counsel. *See* ***State v. Hereford***, 224 Wis. 2d 605, 617, 592 N.W.2d 247, 252 (Ct. App.), review denied, 225 Wis. 2d 490, 594 N.W.2d 384 (1999).

¶69 At the ***Machner*** hearing following Oswald's conviction, his trial counsel defended his tactical decision for not requesting a change of venue. Counsel acknowledged that the case had received extensive media coverage and that some of the media reports were erroneous and prejudicial.

However, he claimed that he balanced the extensive publicity against two other factors affecting the case. He first theorized that Oswald's requested severance of his trial from his codefendant father was more likely to be granted without a change of venue motion because his father had already requested that the court change the venue for his trial. His second consideration was the planned defense strategy for trial.

¶70 In light of the State's strong evidence against Oswald--video tapes depicting Oswald's flight with a hostage and his capture while armed and wearing a bulletproof vest, eyewitnesses, ballistics evidence, his handwritten plans for the crimes and his confession to police officers--defense counsel theorized that the best defense for his client was that Oswald performed the criminal acts because he was coerced to do so by his father. Counsel testified that:

> [W]e ultimately were convinced that it would be preferred ... to seek the ... jury ... from Waukesha County despite the fact that a lot of people had seen the video and were well aware ... of the facts of this case. And I think the reason for that was ... [a] feeling among the community that Ted Oswald's position was different from that of his father; that the relationship between father and son was so unusual that the coercive aspects of our presentation were ... put forth [by] the media.... [T]he image of our client was fairly intact of a young high school student ... look[ing] very young, very vulnerable, very impressionable.... [W]e felt that that was entirely consistent with the defense that we chose to present in this case ... and we

concluded that there would be benefit from having a jury impaneled in Waukesha County.

¶71 Counsel presented well-reasoned testimony in support of his strategy, and it is not this court's prerogative to second-guess counsel's reasonable tactical decisions. *See* ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161, 169 (1983). We reject Oswald's contention that his counsel was deficient for not requesting a venue change after reviewing the prospective jurors' answers to the juror questionnaires. The opinions expressed in the questionnaires only regarded opinions the prospective jurors held about Oswald's alleged participation in the crimes. The opinions revealed by the questionnaires did not reflect on Oswald's state of mind, which was the focus of his coercion defense. His counsel's actions in this regard cannot be construed as deficient but rather are consistent with the planned defense strategy.

¶72 Oswald's only remaining arguments are that: (1) in reaching the conclusion that a coercion defense was feasible, counsel failed to conduct a systematic polling of the Waukesha county community; and (2) Oswald's case was eventually severed from his father's two months prior to trial, allowing plenty of time for counsel to request a venue change. Neither of these contentions evidences deficient performance. Conducting a systematic opinion poll of the county is not an act that is considered necessary for professionally competent assistance. Additionally, the decision of whether to request a change of venue is a tactical decision under the control of defense counsel. Counsel testified that he weighed the alternatives of the case and in his professional judgment the best possible defense for his client was to argue coercion and that a coercion defense would be benefited by remaining in the county. We conclude that counsel was not deficient for failing to request a change of venue.

C. Mental Disease Defense

¶73 Oswald's final argument that his counsel was ineffective is that his counsel did not sufficiently investigate or advance a defense that Oswald should be exonerated of responsibility because of a mental disease or defect. Although Oswald admits that he actively participated in the decision not to pursue a mental disease defense, he now claims that this decision was not a fully informed one. At the postconviction hearing, the defense's expert witness, Minnesota psychologist Dr. James Gilbertson, confessed that he was unfamiliar with Wisconsin's legal standard for a mental disease defense. He further testified that if he had been aware of Wisconsin's legal standard for a mental disease defense, he would have opined that Oswald satisfied this threshold. As a result, Oswald asserts that if his counsel had performed effectively, Gilbertson's support for a mental disease defense would have been revealed. This was prejudicial, he argues, and denied him a potentially viable defense.

¶74 At the postconviction hearing, trial counsel stated that he had considered a mental disease defense from the beginning of the case. Counsel retained a psychologist, Dr. Gary Kendziorsky, who he had previously used and trusted. After interviewing Oswald, Kendziorsky concluded that he was not mentally ill.

¶75 Counsel determined that mental disease was not a viable defense on the basis of Kendziorsky's evaluation and other factors. He testified that Oswald was adamant about not wanting to "play the 'crazy game'" and enter a mental disease defense. Counsel further stated that he discussed the strategic considerations about pursuing such a defense with his client. They discussed that Oswald would

be evaluated by court and state examiners and that the State could receive evidence from these examinations about Oswald's state of mind, potentially weakening the coercion defense. Counsel averred that he believed a mental disease defense was inconsistent with how Oswald presented himself, how others described him and the planned coercion defense. Counsel recommended to Oswald that they focus on the coercion defense and not pursue a mental disease defense. Oswald accepted his counsel's recommendation.

¶76 Oswald now complains that this was an ill-informed decision. He claims that his counsel should have learned that Gilbertson, a psychologist the defense hired to render an opinion supporting the coercion defense, would have also supported a mental disease defense. Gilbertson's initial mental disease determination was based on an erroneous assumption about Wisconsin's legal standard. He testified that Oswald suffered from a "complex posttraumatic stress disorder" that was not a generally accepted diagnosable disease but could satisfy Wisconsin's legal standard. Oswald maintains that if he had been effectively represented, his counsel would have continued serious consideration of a mental disease defense.

¶77 The State replies that the record indicates that counsel fully considered a mental disease defense, and Oswald consented to its rejection. Additionally, it argues, "[C]ounsel was not required to continue shopping for a different expert opinion after he received a reliable opinion from a qualified expert ...." We agree. In light of the circumstances, counsel made an adequate inquiry into a possible mental disease defense. "Competent representation does not demand that counsel seek repetitive examinations of the defendant until an expert is found who will offer a supportive opinion." ***California v. Williams***, 751 P.2d 395, 437 (Cal. 1988). Oswald's ability to produce a conflicting

psychological evaluation at the postconviction hearing does not in itself establish that the factual inquiry was inadequate. The record reveals that his counsel made a reasoned and considered choice to abandon the mental disease defense based on the facts of the case and his judgment of the most appropriate trial strategy. Because counsel's strategic decision was rationally founded on the facts and the law, we conclude that his representation was not deficient.

CONCLUSION

¶78 In summary, we determine that even though the prospective jurors expressed opinions that Oswald was guilty, they were not biased against him. The prospective jurors were not subjectively biased because each prospective juror confirmed that he or she was willing to put the guilty opinion aside, nor were they objectively biased because they did not have ingrained attitudes opposed to the coercion defense. A new trial because of juror misconduct is not warranted because Oswald did not present sufficient proof that the impaneled jurors lied during voir dire and were prejudiced against him.

¶79 Similarly, Oswald's request for a new trial because of the ineffective assistance of his trial counsel fails. His counsel conducted adequate voir dire questioning of prospective jurors and made reasonable, tactical decisions on which jurors to request that the court strike for cause. Finally, regarding counsel's decisions not to request a change of venue or pursue a mental disease defense, counsel did not perform deficiently but made well- reasoned, considered and strategic decisions seeking the best interests of his client.

By the Court.— Judgment and order affirmed.

¶80 NETTESHEIM, J. *(concurring)*. I concur for the same reasons stated in my concurring opinion in ***State v. James Oswald***, 2000 WI App 3, 232 Wis. 2d 103, 606 N.W.2d 238 released this same day.

Supreme Court, U.S.
FILED
OCT 25 2004
OFFICE OF THE CLERK

No. 04-410

In The

Supreme Court of the United States

DANIEL BERTRAND,

Petitioner,

v.

THEODORE W. OSWALD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JEROME F. BUTING*
Attorney for Respondent
BUTING & WILLIAMS, S.C.
400 N. Executive Drive, #205
Brookfield, Wisconsin 53005
(262) 821-0999; fax (262) 821-5599
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
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QUESTION PRESENTED

Was the state appellate court's approval of the trial judge's refusal to conduct even a minimally adequate investigation of blatant juror bias and prejudicial conduct in the jury assembly room, when other jurors confirmed to the judge during the voir dire process that such behavior was occurring, an unreasonable application of *Remmer v. United States*, 347 U.S. 227, 230 (1954), which held that due process requires a trial judge to "determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial," and *Smith v. Phillips*, 455 U.S. 209, 217 (1982), which held that "due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen"?

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STATEMENT OF THE CASE

The United States District Court for the Eastern District of Wisconsin set forth in detail the facts in this case. Pet. App., 24a-37a. The respondent, Theodore Oswald, disagrees with the accuracy of the facts supplied by the Petitioner, and thus relies upon the district court's recitation and the following summary of factual and procedural history in this case.

On April 28, 1994, Ted Oswald and his father, James, were arrested following a police chase from a bank robbery. A police captain was fatally shot and a hostage was taken during the defendants' unsuccessful attempt to flee. A local television news camera crew fortuitously happened upon a police roadblock and broadcast a gun battle with the police, the escape of the hostage and the violent crash of the defendants' getaway vehicle.

The case generated a phenomenal amount of pretrial publicity, both in the immediate aftermath of the sensational live coverage and extensive rebroadcast of the arrest, as well as throughout the months leading up to the trial. The record in the state courts documented some of the pretrial publicity and the effect it manifested on the jury pool. The record revealed that 80% of the jury pool, and 8 of the final 12 jurors, came to court and expressed preconceived opinions that they believed Oswald was guilty. Pet. App., 26a.

Oswald and his father were charged with 19 criminal counts, and later tried separately.

Trial Proceedings

Jury selection in Ted Oswald's case took place over four days. During voir dire the trial court denied defense motions to strike seven jurors for cause. Oswald was forced to utilize all seven of his peremptory strikes in order to remove those jurors from the final panel.[1]

Towards the end of the fourth day of jury selection, it became clear that jurors had been discussing the case while waiting in the jury assembly room. During questioning by the court, Juror Roger Klitzka said that although he had heard or read very little about the case before coming to court, he learned a great deal from his fellow members in the jury assembly room: "I know I've learned more in the last 3 days sitting down there in that room about this case than I have since the day it happened." Pet. App., 5a. He further explained:

> Juror: Well, according to what I hear, the young man is guilty of what he is being accused of and things like that and everything and I just think it's a waste of time.
>
> Court: That it's a waste of time to have a trial at all?
>
> Juror: Yes.

Id. Defense counsel asked the court to strike Klitzka for cause or require that he describe in more detail what he

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[1] Three of those jurors later formed the basis of one of Oswald's issues on appeal, and the federal district court's grant of habeas relief. Pet. App., 66a-83a. The Seventh Circuit did not reach this issue because it affirmed on the trial court's refusal to investigate juror bias. Oswald asserts that the Seventh Circuit's affirmance is also justified on this alternative ground. *Bennett v. Spear*, 520 U.S. 154, 166-67 (1997).

heard. The district attorney opposed both requests, arguing such questions were "none of [defense counsel's] business," and that further questioning would be "intruding into his privacy." Pet. App., 29a. The court refused to either strike the juror for cause or require him to answer further questions about the information he was receiving in the jury assembly room.

Defense counsel then asked the court to inquire of the jurors who had already been qualified what type of information was being spread in the jury room. The court refused counsel's request and instead limited inquiry to questioning of the few remaining jurors who had not yet been examined. Pet. App., 6a. The very next juror (Susan Beers) corroborated Klitzka's testimony that throughout the four days of jury selection, other jurors in the assembly room had expressed their preconceived opinions of guilt: "they will just say it's guilty, you know, right off the top of their head." Pet. App., 31a. Defense counsel renewed his request to re-question Klitzka or the other jurors Pet. App., 32a. The court denied the request, but did go to the jury assembly room over the lunch break to re-instruct the jurors not to discuss the case. At that point one of the jurors, William Schuenke, spoke up to the judge and said: "I really want to talk to you. I had written that letter. It's really important. I don't want to – I'm part of the 29 [i.e., the pool from which peremptories would be exercised]." Pet. App., 7a.

After the lunch recess the court disclosed that it had received four letters from jurors asking to be excused. One of them was Schuenke, who wrote the judge: "I will more than likely be so concerned about my work that I'd not give the trial all the attention it should receive to the point I might just vote either way to end it." *Id.* Defense counsel

asked the court to excuse Schuenke or at least permit further questioning about his letter. *Id.* Counsel explained that the court had already denied seven defense strikes for cause and he intended to use all of his allotted peremptory challenges to remove those seven, thus leaving none to use against Schuenke, who said he might not decide the case on the evidence. Pet. App., 34a. The court refused to remove Schuenke for cause or permit further questioning. *Id.*

Another juror (George Schroeder) also wrote a letter advising the court that although in his voir dire he had promised to set aside his opinions, he now believed Oswald was guilty and he could not be unbiased. *Id.* The court denied defense counsel's request to inquire of Schroeder whether he had changed his mind because of communications from other jurors in the assembly room. *Id.*

When the court later advised the pool of jurors that all requests to be excused had been considered, Schuenke spoke up in front of the others: "I asked to speak to you two days ago. You mean I can't get five minutes of your time?" Pet. App., 7a. The court explained to Schuenke all requests had been addressed, to which Schuenke replied: "Not to me they weren't you know." *Id.* Schuenke served on the jury throughout the trial and verdict because the defense had used all their peremptory challenges on the jurors whom the judge refused to strike for cause. *Id.*

At Oswald's trial, his attorney presented the defense of coercion, arguing that his client had been subjected to years of psychological abuse to such a degree that he was coerced into following his father's instructions to commit the charged crimes. The jury rejected the coercion defense and convicted on all counts.

Post Conviction Proceedings

A post conviction motion was filed and a hearing was conducted which adduced testimony from one of the prospective jurors, Jaqueline Mihm, about the conduct of jurors in the waiting room during the four days of voir dire. Mihm's testimony corroborated the testimony of Klitzka and Beers that numerous jurors in the assembly room were discussing their opinions that Oswald was guilty. She testified that she observed three men repeatedly expressing their opinions that Oswald was guilty and the trial was a sham, a joke, and a waste of time. Pet. App., 35a-36a. Mihm was later removed from the jury pool during the exercise of peremptory challenges, but returned to watch some of the trial. Mihm testified that one of the jurors she heard stating that the trial was a waste of time and Oswald was guilty was sitting on the final panel. *Id.* Mihm's testimony indirectly identified this juror as William Schuenke. Pet. App., 36a.

The state trial court judge rejected Mihm's testimony as unreliable, a conclusion the federal district court found to be an "unreasonable determination of the facts in light of the evidence presented," Pet. App., 57a, citing 28 U.S.C. § 2254(d)(2), primarily because nearly all of Mihm's testimony was corroborated by other evidence, including the jurors who spoke up about the misconduct on the fourth day of jury selection. Pet. App., 59a. The state court of appeals assumed the truthfulness of Mihm's testimony, but held that Schuenke's comments in the jury assembly room did not demonstrate bias, a conclusion the district court found even more unreasonable. Pet. App., 60a. ("A juror who believes that a defendant's guilt is so firmly established that it is unnecessary to hold a trial cannot reasonably be said to be open to any defense.")

The Seventh Circuit did not decide Oswald's claim that Schuenke's presence on the final jury panel deprived him of his right to due process and an impartial jury. That, too, is another alternative ground on which the grant of habeas relief could be affirmed.

Testimony was also taken at the post conviction hearing from defense counsel on the question of ineffective assistance of counsel. Oswald argued that his attorney was ineffective for failing to advance a potentially complimentary defense of not guilty by reason of mental disease or defect. After his conviction Oswald learned that a Minnesota psychologist, Dr. James Gilbertson, who his attorney presented at trial to support the psychological coercion defense, would also have supported an insanity defense, had defense counsel ever provided him with the legal standard applicable in Wisconsin for such a defense. Pet. App., 118a. Oswald's trial attorney acknowledged at the post conviction hearing that he failed to advise his expert of the law in Wisconsin, but felt justified in doing so because he had himself rejected such a defense. *Id.* But Oswald was never told that his lawyer had already employed an expert who could have supported both a psychological coercion and an insanity defense.[2]

The trial court denied all post conviction motions and was affirmed by the Wisconsin court of appeals. Following a denial of review by the state supreme court, Oswald sought federal habeas corpus relief. The district court granted Oswald's petition on the grounds of juror bias and

[2] The ineffective assistance of counsel claim was also raised throughout the federal habeas proceedings, but was never addressed by either court in their decisions.

misconduct and the trial court's failure to adequately investigate such claims when they arose. *Oswald v. Bertrand*, 249 F. Supp.2d 1078, 1097, 1100 (E.D. Wis. 2003) (also found at Pet. App., 23a-84a). The district court also found that the state courts violated Oswald's due process rights by arbitrarily depriving him of state statutory rights to which he was entitled. *Id.* at 1110-11. Because the court granted relief on those grounds, it did not reach the ineffective assistance claim. *Id.*

The State appealed to the Seventh Circuit, which affirmed, in a decision authored by Judge Richard Posner. The State then filed a petition for rehearing and a petition for rehearing *en banc*, which was denied. All three members of the original panel, including the dissenting judge, voted to deny rehearing. No judge in active service requested a vote on the *en banc* decision. The State's petition for review in this Court follows.

REASONS FOR DENYING REVIEW

I. The Seventh Circuit Properly Applied this Court's Clearly Established Law.

The State struggles to fashion an argument that would warrant the involvement of this Court. In its endeavor to find a question worthy of review the State suggests:

> Certiorari is necessary to clarify that, under 28 U.S.C. § 2254(d)(1), a federal court may not distill principles from the court of appeals' interpretation of this Court's holdings or rely upon quoted material which does not figure in this Court's holding in order to assess whether a state court decision is objectively unreasonable.

Pet., at 11. However, "clarification" of these points is neither necessary in general nor required by the decision in this case. The State mischaracterizes the Seventh Circuit's ruling, which neither breaks precedent nor plows new ground. The court carefully identified the nature of Oswald's claim and then simply applied the principles long established by this Court.

The Seventh Circuit decision, authored by Judge Posner, began by noting that a state criminal defendant has a due process right to an impartial jury, and then, citing this Court's precedent, noted that "[i]n addition – and this is critical – the clause requires the trial judge, if he becomes aware of a possible source of bias, to 'determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial.' *Remmer v. United States*, 347 U.S. 227, 230 (1954)." Pet. App., 2a. Judge Posner further explicated the relevant Supreme Court law:

> In *Smith v. Phillips*, 455 U.S. 209, 217 (1982), the Supreme Court put the two points together, saying that "due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and *to determine the effect of such occurrences when they happen*."

Id. at 3a (emphasis added). It was these principles that the Seventh Circuit correctly considered as "clearly established federal law as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

The State argues in this Court that the language from *Smith* as to the timing of the trial court's investigation of prejudicial occurrences is mere *dicta*, and thus not "clearly established federal law" determined by this Court. The State further argues that none of this Court's cases hold

that an immediate investigation into juror bias is necessary to satisfy due process. Pet., at 8-9. In the State's view, it was not necessary for the trial court to investigate immediately when it learned that jurors were discussing the case for four days in the waiting room and concluding, even before the trial began, that Oswald was guilty and the trial a waste of time, because the United States Supreme Court has never specifically required this procedure. This same argument was properly rejected by the Seventh Circuit.

Stringent as the standard contained in § 2254 may be, it does not demand this type of superficial and hypertechnical interpretation. The fact that this Court has not addressed a fact situation identical to this one and concluded specifically that such facts demand a reexamination of the previously questioned jurors does not preclude a federal court from concluding that the trial court's gross failure to investigate and the court of appeals' perfunctory decision condoning it were contrary to and unreasonable applications of clearly established federal law.

For example, in *Williams v. Taylor*, 529 U.S. 362, 391 (2000), this Court held:

> It is past question that the rule set forth in *Strickland* qualifies as "clearly established federal law as determined by the Supreme Court of the United States." That the *Strickland* test "of necessity requires a case by case examination of the evidence" obviates neither the clarity of the rule nor the extent to which the rule must be seen as "established" by this Court.

Id. (citations omitted). In *Williams*, this Court found that the state court unreasonably applied the rule of *Strickland* to conclude that trial counsel's deficient failure to present

mitigating evidence at sentencing did not prejudice the defendant. *Williams*, 529 U.S. 395-96. There was no requirement that the petitioner identify a United States Supreme Court case in which trial counsel failed to present mitigating evidence at sentencing. It was enough that the state court had ruled contrary to and misapplied the clearly established general rule of *Strickland*.

Likewise, prejudicial occurrences may develop in many different ways during jury selection, but it is no less clearly established that a court must be "ever watchful" to "determine the effect of such occurrences when they happen." *Smith*, 455 U.S. at 217. That is all the Seventh Circuit held in this case. The court found that the trial judge "flunked the constitutional test" by failing to undertake a diligent inquiry when the evidence and circumstances clearly suggested that some, and maybe all, of the jurors were biased against Oswald. Pet. App., 8a-9a.

When Klitzka revealed that prospective jurors had been conducting "marathon bull sessions on Oswald's guilt," an alarm bell should have gone off for both counsel and the court. Defense counsel rightly feared that the entire pool of prospective jurors was being poisoned and pleaded with the court to question Klitzka further and to re-examine those jurors who had already been qualified. But the prosecutor (who the Seventh Circuit observed "made every possible effort to prevent the judge's determining whether jurors were biased," Pet. App., 5a) objected to such further inquiry. Even though the circumstances strongly suggested that the jury had made up its mind on Oswald's guilt, and felt that the trial was a waste of time, the trial judge refused to question Klitzka further or recall any of the earlier questioned jurors. In

the context of all the other circumstances described by the court, *see* Pet. App., 8a, the Seventh Circuit correctly held that the trial judge failed the admonition of this Court that a judge must be "ever watchful" for prejudicial occurrences and "determine the effect of such occurrences when they happen."

The State faults the court for saying that it "distilled" from the caselaw the proposition that the greater the probability of bias, the more searching the inquiry must be to insure an unbiased jury is impaneled. The State objects because "this Court has never announced this principle." Pet., at 9. But the Seventh Circuit simply described a common sense proposition, not a new rule of law. AEDPA does not preclude the circuit courts of appeal from stating the obvious. The "clearly established federal law" at issue is the duty of a trial judge to be "ever watchful" for prejudicial occurrences and to conduct an investigation reasonably tailored to determine the effect of such occurrences when they happen.

The trial court's feeble inquiry into juror bias in the waiting room was wholly inadequate. As Judge Posner noted, the trial court's decision to simply remind the jurors not to discuss the case after they had been discussing it for four days "was a case of closing the barn door after the horse had escaped." Pet. App., 8a.

The State further argued in the Seventh Circuit, as it does here, that Oswald had a postconviction hearing which satisfied his right to due process. The Seventh Circuit deemed that argument waived by the State's inadequate briefing. Pet. App., 13a. Nevertheless, the court ruled that even if the issue had been preserved, the postconviction hearing did not satisfy Oswald's constitutional rights. *Id.* Judge Posner observed:

> When the issue of jury bias does not arise until after trial and conviction, the trial judge cannot be faulted for having failed to investigate it, and a postconviction hearing is an inevitable and authorized substitute. *Rushen v. Spain*, 464 U.S. 114, 119 (1983) (per curiam); *Smith v. Phillips*, *supra*, 455 U.S. at 215-18; *id.* at 221-24 (concurring opinion); *Owen v. Duckworth*, 727 F.2d 643, 646 (7th Cir. 1984) (per curiam); *Fitzgerald v. Greene*, 150 F.3d 357, 364-65 (4th Cir. 1998); cf. *United States v. Bishawi*, 272 F.3d 458, 462-63 (7th Cir. 2001). But as *Dyer v. Calderon*, from which we quoted earlier, makes clear, if the issue does surface during, or in this case before, trial, it is the trial judge's responsibility to conduct an adequate investigation, given the unsatisfactory character of an inquiry into jury bias after the trial is over and the defendant convicted. Compare *United States v. Bradshaw*, *supra*, 281 F.3d at 289-93; *United States v. Angiulo*, *supra*, 897 F.2d at 1183-86. Having invested time in the trial and voted to convict the defendant, jurors are unlikely to acknowledge bias, or even to remember the particulars of the discussions that they had had of the case before it was tried – their recollections are likely to be overshadowed by what they learned about the case during the trial. That is why cases such as *Bradshaw* and *Angiulo* stress the importance of a prompt determination, by the trial judge, at the jury selection stage. Obviously if the problem arises or is discovered later, it must be dealt with later; that is all that cases like *Rushen* allow.

Pet. App., 13a-14a.

This Court has emphasized the importance of dealing with juror bias the moment it appears, when the trial

court is still in a position to do something about it. *See, Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966) (court must take steps to prevent prejudicial outside interference at its inception); *Rushen v. Spain*, 464 U.S. 114, 128, n. 6 (1983) (Stevens, J., concurring) (meaningful time to resolve doubts about juror impartiality is when problem can be remedied by replacing the juror).

The Seventh Circuit also correctly held that the state appeals court's perfunctory decision condoning the woeful performance by the trial judge was an unreasonable application of this Court's rulings in *Smith* and *Remmer*. The state appellate court gave no reason for its decision approving the trial court's handling of the jury selection process, other than its "naked conclusion that the judge had done enough." Pet. App., 13a. The state court of appeals never even mentioned this Court's decisions in *Smith* and *Remmer*, and utterly ignored the due process duty of a trial judge to be vigilant to discover and remedy prejudice.

Thus, the Seventh Circuit correctly held that the state court decisions were unreasonable applications of the law and were contrary to the fundamental principles of due process and the Sixth Amendment explicated in such cases as *Smith*. It is "past question" that those principles, like the rule of *Strickland*, constitute "clearly established federal law as determined by the Supreme Court of the United States."

II. The Seventh Circuit Afforded Proper Deference to the State Court Decisions.

The State also argues that the Seventh Circuit decision fails to afford the appropriate deference to the state

court required by 28 U.S.C. § 2254(d)(1). Pet., at 13. Apparently, in the State's view, a federal court must defer to a state court's decision to conduct only a nominal investigation, however inadequate it is in relation to the evidence of juror bias. But even in the context of federal habeas corpus, "deference does not imply abandonment or abdication of judicial review." *Miller-El v. Cockrell*, 123 S.Ct. 1029, 1041 (2003).

This Court's decision in *Yarborough v. Alvarado*, 124 S.Ct. 2140 (2004), adds nothing new to this equation. The State admits that certain facts support the Seventh Circuit's decision, but argues that because others point in the other direction, the federal court must defer to the state courts' decisions. Pet., at 16. But, unlike the question of custody in *Yarborough*, this is not a case where it was a close question on whether the state courts' application of federal law was unreasonable. Therefore, contrary to the State's assertion, this Court's precedents do not demand such a "substantial element of judgment," Pet., at 16, that the state court decisions are insulated from review by a federal court.

The evidence revealed that some, maybe all, of the jurors were biased against Oswald before they heard a shred of evidence. The Seventh Circuit summarized the circumstances:

> The response to the jury questionnaires against the background of enormous publicity concerning the most sensational criminal episode in the county's history, the fact that Oswald seemed so obviously guilty as to make the necessity for a trial questionable to a layperson, the tumult induced by Schuenke's vocal complaints, the flagrant disobedience of the judge's instructions

> that the prospective jurors not discuss the case in advance of the trial, the likelihood that Schuenke and perhaps other reluctant jurors would vote to convict regardless of their actual views if that would make the trial end quicker, the fact that, at least according to Klitzka, the improper discussions had already produced a consensus that Oswald was guilty as charged – *all* these things, taken not separately but together, created a sufficiently high probability of jury bias to require on the part of the trial judge a diligent inquiry.

Pet. App., 8a.

Against these facts, the Seventh Circuit noted that the state appellate court gave no reasons justifying its approval of the trial court's lack of a minimally timely, minimally adequate investigation:

> It is not as if the state appellate court had given reasons for its decision that, even if we did not find them persuasive, we could not pronounce unreasonable. A state court can of course be wrong without being unreasonable, and the reasonableness of a decision ordinarily cannot be assessed without considering the quality of the court's reasoning.
>
> As far as the narrative of the jury selection process is concerned, the accuracy of which is not in question, the state appellate court said *nothing* beyond the naked conclusion that the judge had done enough.

Pet. App., 12a-13a. Requiring a federal court's deference to such a state court decision would amount to "abandonment or abdication of judicial review."

The State further argues that the woefully inadequate inquiry into juror bias was justified because of the defendant's coercion defense, which did not contest his presence and involvement in the crimes. But, as the district court recognized, "nothing in the record indicates that [Oswald] wanted jurors who made or were influenced by statements by other jurors that he was guilty and the trial a waste of time." Pet. App., 52a. No matter how strong the evidence or type of defense offered, a defendant is entitled to an impartial jury. Judge Posner states this point well:

> Oswald was entitled to be tried by a jury that undertook to decide his guilt on the basis of the evidence rather than of what they had learned from the pretrial publicity about the case and analyzed over a four-day period while waiting for the trial to begin. It was natural that having seen the videotape of Oswald's crimes, laypersons would assume his guilt was open and shut. But a jury that decides guilt before the trial begins is little better than a lynch mob.

Pet. App., 12a.

The Seventh Circuit properly considered all relevant information and points of law in concluding that the district court's grant of habeas relief was appropriate. The federal courts did not simply second guess the state courts' judgment. The Seventh Circuit afforded whatever deference the state court decisions were entitled, yet rightly found them to be unreasonable.

III. The Petition Fails to Satisfy Any of this Court's Criteria for a Grant of Certiorari, and There Are Other Independent Grounds Justifying the Relief Below.

The State does not allege that the Seventh Circuit decision conflicts with other federal circuits. Review is thus not necessary to resolve any conflicts among the circuits.

Neither is review appropriate to resolve an important issue likely to affect many other litigants. The facts of this case are so peculiar, and the juror bias so extreme, that it is not likely the Seventh Circuit decision will apply to many future cases in any circuit. Indeed, the State's own petition admits this was a very unusual case, with peculiar facts, a very rarely used psychological coercion defense and the extremely unlikely happenstance of a live television broadcast of a shootout and capture of fugitives. Pet., at 13.

It is certainly not the usual case where a judge discovers in the middle of voir dire that jurors are telling each other outside of court that the trial is a "joke", a "sham" and "a waste of time." It should be obvious to any reasonable judge that such comments do not indicate any degree of willingness to give the defense a fair shake, and that a careful investigation was necessary to ferret out jurors holding such beliefs. As the district court noted: "[a] juror who believes that a defendant's guilt is so firmly established that it is unnecessary to hold a trial cannot reasonably be said to be open to any defense." Pet. App., 61a. The record in this case established that one of the jurors who made such comments did so even after he had assured the court in individual voir dire that he could be fair, and that the same juror actually served on the jury that convicted Oswald. Pet. App., 60a-61a.

The factbound decision of the Seventh Circuit simply applied well settled law, described in *Remmer* and *Smith*, to the very unusual facts in this case. Had the trial court in this case applied common safeguards and procedures to insure that only unbiased jurors sat in judgment, this case would not now be before this Court. One would expect that most judges would be more careful to be vigilant to the possibilities of prejudicial occurrences and that the unusual facts in this case are unlikely to recur with any frequency.

Finally, even the dissenting judge in the Seventh Circuit did not deem this case worthy of panel or *en banc* rehearing. For this reason alone, certiorari should be denied. But in any event, other meritorious arguments show the decision below to be correct without regard to the question sought to be raised by the State in its petition.

As noted earlier, the district court granted habeas relief on two additional grounds not reached by the Seventh Circuit. Each alone would require issuance of the writ, but together they reinforce the decision. Besides the trial court's failure to adequately investigate the shenanigans that were going on in the jury assembly room, the district court also granted relief because a biased juror actually sat on Oswald's jury. Pet. App., 55a-62a. In addition, the district court also granted habeas relief because the state court decisions arbitrarily deprived Oswald of his state rights related to jury selection. Pet. App., 63a-83a. Furthermore, Oswald submits that a fourth claim, ineffective assistance of counsel, fully preserved and briefed in the federal courts but never ruled upon, would also support a writ of habeas corpus. Review by this Court is therefore unwarranted.

CONCLUSION

For the reasons set forth above, the State has not articulated any compelling reason to justify this Court's discretionary review. Oswald respectfully requests that this Court deny the State's Petition for Writ of Certiorari to review the judgment and opinion of the Seventh Circuit Court of Appeals.

Dated this 25th day of October, 2004.

Respectfully submitted,

JEROME F. BUTING*
Attorney for Respondent
BUTING & WILLIAMS, S.C.
400 N. Executive Drive, #205
Brookfield, Wisconsin 53005
(262) 821-0999; fax (262) 821-5599
**Counsel of Record*